2001

Roger K. Eggert, JR., an individual v. Wasatch Energy Corporation, a Utah corporation : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROGER K. EGGETT, JR., an individual,	:	Case No. 20010786-SC
Plaintiff/Respondent,	:	Priority No. 13
vs.	:	
WASATCH ENERGY CORPORATION, a Utah corporation,	:	
Defendant/Petitioner.	:	

BRIEF OF PETITIONER

Review on Writ of Certiorari
to the
Court of Appeals of the State of Utah

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this case pursuant to U.C.A. § 78-2-2(2) and (5).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the court of appeals erred in applying an abuse-of-discretion standard of review to an issue of contract interpretation on the book value of stock.

Standard of Review: Contract interpretation is reviewed for correction of error. *Jones v. ERA Brokers Consol.*, 2000 UT 61, ¶ 12, 6 P.3d 1129.

Preservation of Issue: This contract issue was raised prior to trial (R. 141, 165-68; Tr. 1-8); during the trial both by objection and motion for directed verdict (Tr. 256-57, 264, 907); and in the court of appeals, *Eggett v. Wasatch Energy Corp.*, 2001 UT App 226, ¶¶ 16, 26, 426 U.A.R. 5 (Slip Opinion, hereafter "Slip Op.," in Addendum, hereafter "Add.," at 1).

2. Whether the court of appeals erred in its application of U.R.Civ.P. 47(r), approving the trial court's alteration of the unambiguous jury verdict.

Standard of Review: Interpretation of a rule of civil procedure is reviewed as a matter of law for correction of error. *Utah Medical Products, Inc. v. Searcy*, 958 P.2d 228, 231 (Utah 1998).

Preservation of Issue: Enforcement of the jury verdict was raised by objection at trial (Tr. 990, 994); by post-trial objection (R. 278, 340); and in the court of appeals (Slip Op. at ¶¶ 17, 40).

3. Whether the court of appeals erred in awarding attorney fees that were not apportioned for nonrecoverable fees.

Standard of Review: Recoverability of attorney fees is a question of law reviewed for correction of error. *Foote v. Clark*, 962 P.2d 52, 57 (Utah 1998).

Preservation of Issue: Objection to attorney fees was raised by post-trial motion (R. 284, 331); and in the court of appeals (Slip Op. at ¶¶ 18, 43).

IMPORTANT LEGAL PROVISION

Interpretation of Utah Rules of Civil Procedure 47(r) is relevant to the second legal issue. That provision reads:

> If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

STATEMENT OF THE CASE

This case involves a dispute between the plaintiff, Roger Eggett ("Eggett"), and his former employer, Wasatch Energy Corporation ("Wasatch" or the "Company"), over the book value of stock for which Eggett claimed payment upon termination of his employment. (R. 1.) Wasatch argued that Eggett agreed to be bound by the book value as determined by the Company's independently audited financial statement. However, the trial court permitted Eggett to ignore the audited book value and sent the issue to the jury with Eggett's "adjustments" for a higher book value. (Slip Op. at ¶¶ 3, 10-11.)

The jury returned a special verdict, finding a book value *for the entire Company* of $135,672. (R. 267, Question 5, Add. 23.) Plaintiff's book value was to be determined by

multiplying Company book value by Eggett's ownership interest of 36.5 percent. However, immediately after reading the verdict answer, the trial judge, Honorable David S. Young, *sua sponte* altered the verdict question to refer only to the book value of *Eggett's* stock. (Tr. 988-95, Add. 30-37.) The court thereafter entered judgment awarding Eggett the full $135,672, instead of only his 36.5 percent of that verdict figure. (R. 367, Add. 16.) The court also awarded Eggett attorney fees, without reduction for nonrecoverable fees. (Supplemental Judgment, unnumbered, R. Vol. II, Add. 19; Slip Op. at ¶¶ 12-15.) Wasatch appealed from both judgments. (R. 392, Amended Notice of Appeal, unnumbered, R. Vol. II.) The court of appeals affirmed. (Slip Op. at ¶¶ 44-45.) This Court granted Wasatch's Petition for Writ of Certiorari.

STATEMENT OF FACTS

A. Shareholder Agreement on Book Value.

In 1993, Eggett formed Wasatch to market and distribute natural gas purchased from small producers. (Complaint, R. 1-2; Tr. 107-11, 130; Slip Op. at ¶ 2.)

On April 13, 1995, Eggett entered into a Shareholders' Agreement ("Agreement") with the Company's other two employees, Todd Cusick and Curtis Chisholm. Eggett prepared the Agreement and signed it as both a shareholder and officer, on behalf of the Company. (Tr. 310; Trial Exhibit, "Exh.," 1, Add. 38, 48.) This Agreement set forth the shares of Company stock allotted to each of the three employees, with Eggett as the majority shareholder. Paragraph 2 of the Agreement provided that, upon termination of employment of any shareholder, the remaining shareholders or corporation would have

the option to purchase the stock of the terminating shareholder. Paragraph 3 of the Agreement set the purchase price for the stock of the terminating shareholder as the "Book Value" of the stock. Paragraph 18(d) defined "Book Value" as follows:

> "Book Value" shall mean the consolidated net shareholders' equity of the Corporation determined as of the end of each [fiscal year] as certified to by the firm of independent public accountants then regularly employed by the Corporation . . . . Such determination shall be made on an accrual basis *in accordance with generally accepted accounting principles and shall be binding and conclusive upon the parties to this Agreement*. . . . The "Book Value" . . . shall be based on audited financial statements. [Add. 46, emp. added; Tr. 112-17; Slip Op. at ¶ 3.]

B. Termination of Employment.

Over time, various management disputes developed between Eggett and Wasatch. (Tr. 125-32; 170-97, 208-50, 316-40, 388-430, 470-80, 529-33, 756-70.) Unable to resolve these disputes, Eggett submitted a letter of resignation, dated April 15, 1997. In that letter, Eggett conceded that, "[i]n accordance with the Shareholders' Agreement . . . I am required to sell my shares . . . for the audited Book Value as of June 30, 1997," the date of the Company's fiscal year-end audit. (Exh. 3, Add. 85.) In a letter dated April 25, 1997, Wasatch formally accepted Eggett's resignation. (Exh. 4; Tr. 132-38, 141-42, 895-96; Slip Op. at ¶ 5.)

Wasatch subsequently terminated Eggett for cause based on misappropriation of funds and excessive compensation. (Exhs. 6, 38, and 7.) By the terms of the Shareholders' Agreement, if Eggett was terminated for cause, he would not be entitled to "book value" of his stock, but only to "par value." (Agreement, ¶ 3.) Wasatch

accordingly tendered Eggett a check for the par value of his stock, in the amount of $1,217. (Exh. 8.) However, Eggett rejected the offer and filed suit, seeking additional compensation and the book value of his stock. (Tr. 146-51, 347-52, 388, 435-54, 470-505, 509-10, 597-618, 642, 712-14, 723-28, 744-48, 773-86, 845; Complaint, ¶¶ 14, 19, R. 3-4; Slip Op. at ¶¶ 6-8.)[1]

C. Trial and Evidence on Book Value.

On the stock issue, Eggett claimed, and the jury found, that Eggett was not validly terminated for cause; therefore, he was entitled to the book value of his stock, which was to be determined as of June 30, 1997. (Special Verdict, Questions 3 and 4, R. 267, Add. 23; Slip Op. at ¶¶ 8, 12.) Wasatch does not challenge either of those jury determinations on appeal. The sole focus of this appeal (aside from attorney fees) is the correct book value of Eggett's stock.

Eggett alleged in his complaint that the book value of his stock, comprising 36.5 percent of the Company's shares, was $80,000. (Complaint, ¶ 20, R. 4.) At trial, Eggett testified that, to determine his book value, "you take the equity of the company and you multiply it by my ownership interest, which was 36.5%, so we have to determine the amount of ownership equity that was in the company." (Tr. 256; *see also* Exh. 26, p. 6,

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[1] On the issue of compensation, Eggett claimed a right to unpaid profit sharing in the amount of $66,688. (Exh. 26, p. 5; Tr. 252-55, 894.) Wasatch argued that Eggett was entitled to maximum additional income of only $5,700. (Exh. 42, p. 4; Tr. 573, 980.) Finding a figure between those extremes, but closer to the Wasatch number, the jury awarded Eggett additional compensation of only $11,888. (Special Verdict, Questions 1 and 2, R. 266, Add. 22; Slip Op. at ¶ 12.) Wasatch does not challenge that compensation verdict on appeal.

Add. 49.) Both parties relied on that formula throughout the trial. The parties agreed that Company stockholder equity ("book value") is determined by adding retained earnings and contributed capital. (Tr. 281-82, 570-73.) As set forth in the Company's audited financial statement for June 30, 1997, retained earnings equaled $57,703. (Exh. 42, p. 3, Add. 56.) That figure added to contributed capital equaled total Company stockholder equity of $75,452. (*Id.*; Tr. 573, 669.) Applying Eggett's formula, that total Company equity is multiplied by Eggett's ownership interest of 36.5 percent to derive the book value of Eggett's stock at **$27,540**. (Slip Op. at ¶¶ 9-10.) Based on the Shareholders' Agreement, Eggett is conclusively bound by that book value of his stock, as established by the independently audited financial statement.

At trial, however, Eggett sought to increase the book value of his stock by making certain "adjustments" to the Company's audited financial statement. He presented evidence that retained earnings should be increased by adding three different items he claimed the independent auditors had improperly left out: (1) $283,000 for anticipated loss on a so-called "swap contract" on which Eggett claimed there was ultimately no loss (Tr.266-69); (2) $296,252 for so-called "suspense items," which include uncertain earnings held in suspense on Company books until exact amounts can be determined (Tr. 272-77); and (3) $45,553 for a disputed contract with Gryndberg Energy, on which Eggett claimed there was no dispute (Tr. 277-81). These adjustments would increase retained earnings from $57,000 to $682,000. (Tr. 891-93; Exh. 26, p. 7, Add. 50.) Eggett added that figure to contributed capital to reach total Company stockholder equity of $699,778.

(*Id.*, Add. 51.) Multiplying that figure by his ownership interest of 36.5 percent, he fixed the book value of his stock at **$255,419**, nearly ten times the value established by the audited financial statement. (*Id.*; Tr. 893-94; Slip Op. at ¶ 11.)

Wasatch's counsel objected to Eggett's adjustments to retained earnings, arguing that Eggett was contractually bound by the retained earnings figure in the audited financial statement, and that such adjustments violate generally accepted accounting principles. (Tr. 256, 264-65.) Eggett presented no expert testimony in support of his adjustments to the Company's audited financial statement. In fact, Eggett conceded that the Company's audited statement for June 30, 1997 was prepared in accordance with generally accepted accounting principles, and that his retroactive adjustments to increase Company equity would be contrary to those principles. (Tr. 890, 290-92.) Further, both the Company's chief financial officer and its independent auditor, representing Ernst & Young, testified that Eggett's retroactive adjustments to the audited statement were unjustified and violated generally accepted accounting principles. (Tr. 570-79, 653-70.) Eggett admitted that his book value calculation deviated from the value in the audited statement and, therefore, was outside the terms of the Shareholders' Agreement; nonetheless, he asked the jury to award him what they considered "fair and just." (Tr. 313-15.)

At the close of evidence, Wasatch moved for a directed verdict on the book value of Eggett's stock, arguing that Eggett was contractually bound by the definition of book value in the Shareholders' Agreement. (Tr. 907, Add. 27.) By that Agreement, the book

value established by the independently audited financial statement was "binding and conclusive upon the parties." (Add. 43.) However, the trial court denied that motion, ruling that to hold Eggett to his Agreement would be "inequitable." (Tr. 908-09, Add. 28-29; Slip Op. at ¶ 25.) The court thus approved Eggett's adjustments to the audited statement and submitted the issue of book value to the jury.

D. Jury Verdict As Rendered and Revised.

The issue of book value was submitted to the jury in Special Verdict Question 5. Eggett made no objection to the form of the question. (Tr. 925-29.) That question, following the formula used by both parties during the trial, asked the jury to determine the total book value of the *Company*: "On the date for evaluation of the shares that you selected above [June 30, 1997], what was the 'book value' of Wasatch Energy as defined by the Shareholders Agreement?" (R. 267, Add. 23.) The clear intent of the parties, consistent with the trial formula, was to multiply this Company book value by Eggett's ownership interest of 36.5 percent to obtain the book value of Eggett's stock, thus sparing the jury the math and avoiding any risk of computational error.

The jury came back with the answer to Question 5, finding a total *Company* book value of $135,671.96. (*Id.*) The jury was not asked to make, and did not make, any determination as to what amount Eggett should be awarded as the book value of his stock. However, after reading the verdict, Judge Young, on his own initiative and without any prior objection from Eggett's counsel, *rephrased* Question 5, stating that it was "confusing," that the jury's response was a "mistake," and that the question should be

altered to fit the jury's answer. (Tr. 989-90; Add. 31-32.) Over the objections of defense counsel, the judge revised Question 5 to ask whether that was the amount owed to Eggett. The judge opined that Question 5 was "ambiguous" because "I don't know how they would have come up with the book value of that company at 135." (Tr. 990, 993, 995; Add. 32, 35, 37.) The judge then asked the jury his revised, confusing, compound question whether Eggett was entitled to 36.5 percent of $135,000 or to the full $135,000. Prompted by the trial court's expressed view of the question, each juror answered "yes" to the judge's question, leaving the judge room to apply his own inference that they intended to award the full $135,000. (Tr. 991-93, Add. 33-35; Slip Op. at ¶¶ 12-14.)

The court subsequently rejected Wasatch's objections to the proposed order, which sought that the order conform to the actual verdict (R. 278, 340), and entered Judgment for Eggett in the amount of the full $135,671.61. (R. 367-68, Add. 16-17.) The court subsequently entered a Supplemental Judgment awarding Eggett costs and attorney fees as the prevailing party. (R. Unnumbered item filed April 7, 2000, Add. 19.) Wasatch appealed from both judgments. (R. 392, and unnumbered item filed April 13, 2000.)

The court of appeals affirmed, ruling that Eggett was not bound by the definition of book value in the Shareholders' Agreement, but could offer adjustments to the audited financial statement to increase his book value. (Slip Op. at ¶¶ 19-26.) The court of appeals also affirmed alteration of the jury verdict, ruling that it was ambiguous and that the district court "could have surmised 'that there [wa]s some patent error.'" (*Id.* at ¶¶ 27-40.) Finally, the court of appeals affirmed the award of unapportioned attorney fees

on the basis that Wasatch supposedly failed to marshal the evidence. (*Id.* at ¶¶ 41-43.) This Court granted Wasatch's Petition for Writ of Certiorari on all three issues.

SUMMARY OF ARGUMENT

The central issue here is the correct book value of Eggett's stock. This Court has two different figures from which to choose. First is the book value established by the Company's audited financial statement. Eggett agreed, by signing the Shareholders' Agreement, which he prepared, that he would be bound by this measure of book value. Eggett presented no legal or factual basis to avoid enforcement of that stock buyout agreement. The court of appeals erred by refusing to enforce that contract. The Company's audited financial statement fixed Company book value at $75,452. Eggett's 36.5 percent share of that book value is **$27,540**. That is the agreed "Contract Book Value." That is the book value that this Court is obligated to enforce as a matter of law.

Alternatively, if the issue of book value was properly submitted to the jury with Eggett's adjustments to Company book value, then his book value should be determined by the jury's verdict. In response to Special Verdict Question 5, plainly asking for the book value of *the Company*, the jury provided the figure of $135,672. Eggett's 36.5 percent share of that book value is **$49,520**. That is the "Jury Book Value." If the contract is not enforced, Wasatch is entitled to have the jury verdict enforced. Question 5 contains no ambiguity, and Eggett's counsel made no objection to it. The jury verdict contains no "patent error" to justify the questioning by Judge Young. Accordingly, *Rule 47(r) has no application to this case*. The court of appeals erred in its interpretation and

application of Rule 47(r). Judge Young had no authority to express his opinion that the verdict was erroneous and to impose his view that Eggett should be awarded the full **$135,672**. That is the "Judge's Book Value." To award that book value would be clear legal error, sanctioning judicial incursion into the exclusive province of the jury.

Finally, the court of appeals erred by affirming the award of attorney fees to Eggett on the basis of the marshaling requirement. The attorney fee award is erroneous as a matter of law because Eggett failed to apportion his claimed fees between those claims that allow recovery of fees and those that do not. Marshaling of evidence applies only to challenges of factual findings, not to legal challenges; therefore, the marshaling requirement has no application to this case. In addition, if Wasatch prevails on either of its arguments on appeal relating to book value of Eggett's stock, Wasatch is entitled to fees and costs on appeal, as well as to reduction of Eggett's fees and costs at trial.

ARGUMENT

POINT I: THE COURT OF APPEALS ERRED IN REFUSING TO ENFORCE THE CONTRACT DEFINITION OF BOOK VALUE BY APPLYING THE WRONG STANDARD OF REVIEW.

A. Enforcement of the Stock Buy-Out Agreement.

Courts are required to enforce contracts consistent with the intent of the parties, as manifest by the plain terms of the contract. Unambiguous contracts are interpreted as a matter of law for correctness, without deference to the lower court. *See, e.g., Jones v. ERA Brokers Consol.*, 2000 UT 61, ¶ 12, 6 P.3d 1129; *Lee v. Barnes*, 1999 UT App 126, ¶ 7, 977 P.2d 550. "The plain meaning rule preserves the intent of the parties and

protects the contract against judicial revision." *Plateau Mining Co. v. Utah Division of State Lands*, 802 P.2d 720, 725 (Utah 1990). *See also Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) (effect must be given to the intent of the parties); *Republic Group, Inc. v. Won-Door Corp.*, 883 P.2d 285, 294 (Utah App. 1994) ("trial court must give effect to the intentions of the parties"); *Verhoef v. Aston*, 740 P.2d 1342, 1344 (Utah App. 1987) ("[c]ontracts should be construed so as to give effect to the parties' intentions"). A court is not free to disregard or rewrite a contract simply because it may produce a result that appears to the court as unfair to one of the parties. *E.g., Dalton v. Jerico Constr. Co.*, 642 P.2d 748, 750 (Utah 1982) ("it is not for a court to rewrite a contract improvidently entered into at arm's length or to change the bargain indirectly on the basis of supposed equitable principles"); *Rio Algom Corp. v. Jimco Ltd.*, 618 P.2d 497, 505 (Utah 1980) ("A court will not . . . make a better contract for the parties than they have made for themselves.").

Moreover, in construing a contract, a court is bound by the plain language of the contract. Extrinsic evidence is not admissible to alter, augment, or circumvent the terms of an unambiguous contract. *E.g., Winegar, supra*, at 108 (court may consider extrinsic evidence only if the contract language is "ambiguous or uncertain"); *Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989) ("use of extrinsic evidence is permitted only if the document appears to incompletely express the parties' agreement or if it is ambiguous in expressing that agreement").

Unambiguous contracts should be enforced as a matter of law. For example, in *Brown v. Richards*, 840 P.2d 143 (Utah App. 1992), the defendant agreed to purchase the stock in plaintiff's business for $900,000, with an option to purchase the building. After defendant defaulted, plaintiff obtained a jury verdict for an additional $500,000, claiming that defendant had agreed to increase the purchase price if the option were not exercised. The court of appeals reversed, holding that because the purchase price was clearly stated in the contract, with no provision for increasing the purchase price, defendant was "entitled to a directed verdict" on the purchase price, and "the question should not have been submitted to the jury." *Id.* at 148. Likewise, in the present case, the Shareholders' Agreement contained no provision for increasing the "book value" of stock. Therefore, the book value in the audited statement should have been enforced as a matter of law.

Similarly, in *Webb v. R.O.A. General, Inc.*, 804 P.2d 547 (Utah App. 1991), the plaintiff sued for unpaid compensation under a written employment contract. The employer claimed that the parties actually intended payment at levels different from what was written. The court of appeals affirmed summary judgment for the plaintiff, holding that the employer was bound by the terms of the contract. "Courts are not obligated to rewrite contracts entered into by parties dealing at arms' length, to relieve one party from a bargain later regretted, simply on supposed equitable principles." *Id.* at 551. Extrinsic evidence of the employer's intent "was inadmissible to vary the terms of the contract." *Id.* at 552. Likewise, in the present case, the court of appeals erred by permitting Eggett to augment the audited book value on supposed equitable principles.

Stock buy-out agreements commonly rely on the "book value" of the stock and are also enforced as a matter of law. For example, in *Swecker v. Rau*, 1990 U.S. Dist. LEXIS 3301 (D. Pa. 1990), the parties organized a small business and entered into a stock purchase agreement by which the company could purchase the stock of a departing shareholder at book value. When the departing plaintiff learned the book value of his stock, he sued to have his stock valued by another method and sought to introduce other evidence of value on the grounds that the term "book value" was ambiguous. *Id.* at *7. The court granted summary judgment to defendants, holding that the plaintiff was bound by the agreed book value of his stock:

> [T]he agreement adopts the book value contained in the corporation's financial statement, as prepared by an independent certified public accountant in accordance with generally accepted accounting principles. Thus, the clear intent of the parties is ascertainable from the unambiguous language of the document itself, and parol evidence is inadmissible. [*Id.* at *7-8.]

Accordingly, a departing shareholder who has agreed to accept the book value of his stock cannot later alter the book value simply because he disagrees with the book value calculation. In *Crowder Constr. Co. v. Kiser*, 517 S.E.2d 178 (N.C. App. 1999), the defendant employee signed a shareholder agreement providing that, upon termination of employment, stock would be sold to the company at the adjusted book value established by the audited year-end financial statement. The employee later rejected his stock valuation, contending that book value of his shares was too low because company auditors had made adjustments for tax liability, uncompleted contracts, and other timing

adjustments. The company sued to enforce the agreement, and the court granted summary judgment to the company.

Affirming that judgment on appeal, the *Kiser* court held that the accountants were authorized to "adjust the book value per share to account for several possible contingencies related to the Company's bookkeeping practices." *Id.* at 185. The plaintiff argued that the accounting adjustments made stockholder equity artificially low, and that the total should be increased for additional inventories and over-depreciation of equipment. *Id.* at 186-87. However, the court rejected those arguments as mere differences in accounting judgment. "There is no contention that [the independent auditors] failed to follow generally accepted auditing standards in reviewing the Company's financial statement." *Id.* at 188. The court concluded:

> Where the value of a closely held corporation is determined by the use of its balance sheet as directed by a "buy-out" agreement, and is calculated by the accounting firm normally servicing that corporation in accordance with the terms of the "buy-out" agreement, we hold that *the value determined by that accounting firm is presumptively correct*, in the absence of mathematical error, evidence of fraud (such as willful concealment of assets), or evidence of a failure to follow generally accepted accounting practices. [*Id.* at 189, emp. added.]

Thus, mere differences in judgment or accepted accounting methods cannot justify avoidance of agreed book value. In *Area, Inc. v. Stetenfeld*, 541 P.2d 755 (Alas. 1975), the corporation entered into an agreement with a departing shareholder to purchase the shareholder's stock at the book value established by the most recent financial statement. The court enforced the agreement over the objection of the corporation that the stock had

been overvalued. The court reasoned that "book value" has no fixed legal meaning, and that different results can be obtained by different methods of calculation. The method used was consistent with accepted accounting principles; therefore, the corporation was bound by the agreement and could not alter the book value retroactively. *Id.* at 763-64. *See also Jones v. Harris*, 388 P.2d 539, 542 (Wash. 1964) ("book value" of stock is the value established by company financial statements and courts should accept valuations reached through accepted accounting practices); *Sperco v. M&SD Corp.*, 1989 U.S. Dist. LEXIS 973, *8 (D. Ill. 1989) (parties agreed to book value of stock established in accordance with accounting principles and court cannot "renegotiate a contract . . . to ensure a more favorable result").

B. Application to Present Case.

Based on the foregoing legal principles, the court of appeals was required to enforce the book value of Eggett's stock, without Eggett's adjustments, as a matter of law. Because "book value" is unambiguously identified as the standard in the Shareholders' Agreement, and there is no dispute as to the Company book value shown by the audited financial statement, Wasatch was entitled to a directed verdict setting Eggett's book value at $27,540, the Contract Book Value. That issue should never have gone to the jury. *See Brown v. Richards, supra*, 840 P.2d at 148; *Swecker v. Rau, supra*, at *14 ("the contractual provision . . . is enforceable as a matter of law").

The court of appeals erred by approving Eggett's adjusted book value on supposed equitable principles. A court is not free to ignore or rewrite a contract to achieve what it

perceives as a more equitable result for one party. *See, e.g., Webb v. R.O.A. General, Inc., supra*, 804 P.2d at 551; *Dalton v. Jerico Constr. Co., supra*, 642 P.2d at 750. The purpose of relying on the valuation of independent auditors is to avoid subsequent conflict over the parties' own biased valuations. If a party can later simply ignore the agreed valuation because of disappointment with the result, then such buy-out agreements are rendered meaningless.

Eggett has presented no valid basis to disregard the Contract Book Value. He conceded in his resignation letter, "I am required to sell my shares in the corporation . . . for the *audited Book Value as of June 30, 1997*." (Add. 85, emp. added.) Eggett's Complaint also cited and sought to enforce the Shareholders' Agreement, alleging that the book value of his shares was $80,000, multiples less than the $255,000 sought at trial. (R. 4.) Neither has Eggett alleged that the independent auditors failed to follow generally accepted accounting principles. Under questioning by his own counsel, Eggett testified:

> Q . . . You're not claiming that the audit is not prepared in accordance with generally accepted accounting principles?
> A I'm not. [Tr. 890; see also Tr. 573.]

Nor has Eggett alleged any mathematical error or fraud. Therefore, the audited book value is "presumptively correct" and binding as a matter of law. *See Crowder Constr. Co. v. Kiser, supra*, 517 S.E.2d at 189.

Eggett concedes that accounting principles allow for "a range of reasonable answers." (Tr. 891.) Following accepted accounting principles, the auditors excluded the swap contract, suspense items, and Gryndberg contract from income because those

amounts were too speculative and uncertain as of the statement date. (Tr. 659-70.) Eggett simply disagrees with the auditors' professional judgment, seeking to add those items back into retained earnings on the basis of hindsight, *actual* outcomes *after* the audit date. However, such retroactive adjustments clearly violate accepted accounting principles. (Tr. 573-79, 669-70.) As noted above, mere differences in accounting judgment between Eggett and the auditors cannot justify disregarding the contract. *Crowder Constr. Co. v. Kiser, supra*, at 188-89; *Area, Inc. v. Stetenfeld, supra*, 541 P.2d at 764.

The court of appeals also erred by characterizing this contract issue as relating solely to admission of evidence and, accordingly, applying an abuse-of-discretion standard of review. (Slip Op. at ¶¶ 16, 26.) Wasatch opposed Eggett's adjustments to retained earnings as a matter of contract law, on the basis that they were prohibited under the terms of the Shareholders' Agreement, as shown above. In the court of appeals, Eggett conceded the terms of the Agreement, but then sought to justify admission of his adjustments as evidence of breach of the covenant of good faith and fair dealing. The court of appeals accepted this ploy and affirmed admission of the adjustments as an *evidentiary* matter without addressing the real issue, which is enforcement of the Contract Book Value as a matter of law.

The court of appeals analysis is faulty for two reasons. First, while Eggett *alleged* breach of good faith and fair dealing, he sought *no recovery* for that claim at trial (and none was obtained). If Eggett believed the Company's accounting practices constituted

bad faith, he could have sought a separate recovery for that claim, but he did not. The Special Verdict Form is absolutely silent on the subject, referring only to the breach of contract claims for unpaid compensation and the book value of his stock. Eggett's adjustments were plainly and expressly offered for the purpose of increasing his book value, as shown by his own trial exhibits (Add. 49-51), not to obtain a separate recovery for breach of good faith. (R. 117; Tr. 10, 255-89, 888-94.) Second, even if the adjustments were admissible to prove breach of good faith, the court of appeals *was still required to enforce the Shareholders' Agreement* on the book value of Eggett's stock. That is, apart from any proof or claim of bad faith, the book value of Eggett's stock should still be limited to $27,540, as a matter of law. The court of appeals, though, addressed only the contrived evidentiary issue and overlooked the central legal issue. Neither the court of appeals nor the district court has "discretion" to ignore enforcement of the Shareholders' Agreement, regardless of what evidence may be admitted on other claims.

In summary, this Court should enforce the Shareholders' Agreement by limiting Eggett's recovery to the actual book value of his stock, $27,540.

POINT II: THE COURT OF APPEALS ERRED IN REFUSING TO ENFORCE THE JURY VERDICT, APPROVING ALTERATION OF THE UNAMBIGUOUS VERDICT UNDER RULE 47(r).

Alternatively, if the Contract Book Value is not enforced, then the jury verdict on book value ("Jury Book Value") should be enforced. The jury verdict on Company book value was $135,672, giving Eggett's stock (36.5 percent) a Jury Book Value of $49,520.

However, the court of appeals erroneously applied Utah R. Civ. P. 47(r) to affirm the trial court's alteration of the verdict question, giving Eggett the entire $135,672 ("Judge's Book Value").

A. Enforcement of the Jury Verdict.

Under long-standing Utah law, jury verdicts are binding on the parties and the trial court, and the court has no discretion to alter a verdict absent obvious error or a motion for new trial. *E.g., Brigham v. Moon Lake Electric Ass'n*, 470 P.2d 393, 396-97 (Utah 1970). Once the jury has found the facts and rendered its verdict, the court is required to enter judgment on the verdict as rendered. *Id.*; *Houston Real Estate Inv. Co. v. Hechler*, 152 P. 726, 727 (Utah 1915) (trial court erred in refusing to enter judgment on the jury's verdict). After the jury's verdict is rendered, "the trial court may make corrections of *obvious errors or defects* therein, . . . [b]ut . . . it is not the trial court's prerogative to make findings inconsistent therewith and thereby defeat the effect of the jury's findings." *First Security Bank v. Ezra C. Lundahl, Inc.*, 454 P.2d 886, 889 (Utah 1969) (emp. added). Unless some patent error "is clearly shown, the verdict of the jury should stand." *EFCO Distributing, Inc. v. Perrin*, 412 P.2d 615, 617 (Utah 1966). "[T]he court should not upset a verdict merely because it may disagree. If it did so, the right of trial by jury would be effectively abrogated . . . ." *Id.* at 618. Judicial tampering with a jury verdict invades the exclusive province of the jury, blurring the separate roles of judge and jury, and effectively denying the right to a jury trial. *See Groen v. Tri-O-Inc.*, 667 P.2d 598, 601 (Utah 1983); U.C.A. § 78-21-2 and -3; Utah R. Civ. P. 38(a).

Moreover, objections to the form of a special verdict question must be made *before* the question is submitted to and answered by the jury; otherwise, the objection is waived. *See Baker v. Cook*, 308 P.2d 264, 266-67 (Utah 1957) ("If the defendant felt that the questions were so drawn as to confuse the jury, request should have been made to clarify the questions . . . ."); *Goggins v. Harwood*, 704 P.2d 1282, 1289 (Wyo. 1985) (party waived alleged error in special verdict form by failing to object prior to submission to jury); *State ex rel. Sam's Texaco & Towing, Inc. v. Gallagher*, 842 P.2d 383, 389 (Or. 1992) (party must object to special verdict form before jury retires or objection is waived).

In the present case, the Special Verdict form was proposed and agreed to by the parties. (R. 184, 270.) Moreover, Eggett's counsel inspected and approved the form, correcting only a typographical error in Question 3. (Tr. 847-48.) He made no objection to Question 5, which asks for the "'book value' of Wasatch Energy." After presenting the jury instructions, Judge Young read the entire Special Verdict form to the jury. Again, only technical and typographical corrections were made, each of which was initialed by Judge Young. (Tr. 925-29; Add. 22-24.) No correction was made to Question 5. Neither Eggett's counsel nor Judge Young raised any objection or question regarding the meaning or clarity of Question 5; there was no mention or suggestion of any ambiguity. The question plainly asked for the "'book value' of Wasatch Energy," to which the parties would apply Eggett's ownership percentage to derive Eggett's book value. Because Eggett's counsel made no objection to Question 5 before submission to and completion

by the jury, any objection of ambiguity was waived. *Baker v. Cook, supra*, at 266-67; *Gallagher, supra*, at 389.

Neither does the jury's response to Question 5 contain any "patent" or "obvious" error. Responding to the unambiguous question, "[W]hat was the 'book value' of Wasatch Energy," the jury's only response was to fill in the blank with a number: "$135,671.96." That number alone constituted no patent error because it was well within the range of evidence presented by the parties. Wasatch proved, based on the audited financial statement, a total Company book value of $75,452. (Add. 56.) Eggett, with his "adjustments," claimed total Company book value of $699,778. (Add. 51.) Accordingly, the jury's answer falls between these two numbers, but is closer to the figure in the audited financial statement. To provide some perspective by comparison, the jury's answer amounts to approximately 19 percent of what Eggett requested, nearly the same ratio of demand-to-award as what the jury awarded for unpaid compensation. (*See* footnote 1, *supra*.) Because the jury's answer did not exactly match either party's figure, it was evident that the jury had included some portion of one or more of Eggett's adjustments, which was the jury's prerogative, given the trial court's denial of a directed verdict. However, the jury's answer, on its face, contained absolutely no indication of "patent error."

The court of appeals strains to identify some patent error, but finds none. Citing the disparity between the parties' evidence on Company book value, the court speculates that "the trial court could have *surmised* 'that there [was] some patent error in connection

with the verdict' when the jury *awarded Eggett* $135,671.61." (Slip Op. at ¶ 35, emp. added, citation omitted.) However, the court of appeals fails to identify any such "patent" error. Based on this hypothetical, unidentified error, the court of appeals held that the trial court "properly exercised its discretion" to correct the error. (*Id.* at ¶ 40.) However, an error that is merely "surmised" ("to imagine or infer on slight grounds") is not "patent" ("readily visible, obvious, or apparent"). *See* Webster's Collegiate Dictionary, pp. 851, 1186 (10th ed. 1993). The entire court of appeals analysis is based on this contradiction in terms. Moreover, by the plain terms of Special Verdict Question 5, *the jury did not "award Eggett" anything*; it found the "'book value' of Wasatch Energy." This mischaracterization of the question, by itself, reveals the court's flawed understanding of the case. The court also relied on erroneous numbers for Company book value, having miscalculated the numbers or misunderstood the evidence. As noted above, Wasatch proved Company book value of $75,452, *not* $133,155; and Eggett claimed an adjusted Company book value of $699,778, *not* $757,452. (*See* Slip Op. at ¶¶ 33-34; *compare* Add. 56 and 51.) Accordingly, the "patent error" is not in the jury verdict, but in the court of appeals analysis.

Relying on its erroneous calculations, the court of appeals concludes, irrationally, that because the jury verdict did not match the parties' figures, but came closest to the Wasatch figure, "the *possibility* that there *might have been an error*" is increased. (Slip Op. at ¶ 36, emp. added.) Why the chance for error was increased by a verdict closer to Wasatch's figure is not explained. In any event, *possible* error is not *patent* error. Every

verdict contains possible error. If judges were free to inquire into every verdict for possible error, no verdict would be safe from judges who simply disagree with the result, and the line separating judicial and jury roles would be obliterated. Juries are entitled to a wide latitude in awarding damages, and their awards are not required to match with mathematical precision the evidence offered by the parties. *E.g., EFCO Distributing, supra*, 412 P.2d at 618 ("the judgment of the jury should be allowed to swing through a wide arc within the limits of how reasonable minds might see the situation"); *Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078, 1083-84 (Utah 1985). Accordingly, a trial judge has *no prerogative* to inquire into the basis of a verdict that is *regular on its face* simply because the judge may disagree with the verdict, consider it too low, or view it as unsupported by the evidence. Such review is properly invoked only by motion for new trial. *See EFCO Distributing, supra*, at 618; *First Security Bank, supra*, 454 P.2d at 889; *Brigham v. Moon Lake Electric, supra*, at 397 (trial court cannot assess sufficiency of the evidence unless a motion for new trial asserting insufficiency is presented).

The court of appeals also offers the implausible explanation that Judge Young was so "intimately familiar" with the evidence that he knew, instantly upon seeing the verdict, without any calculation or consultation with the jury, that the jury had added Eggett's "suspense account" adjustment to the audited book value and then multiplied that total by Eggett's ownership percentage to derive the value of *Eggett's* stock. (Slip Op. at ¶ 37.) This speculation by the court of appeals overlooks two important facts. First, the question did *not* ask for the value of *Eggett's* stock; therefore, the judge could not rationally have

assumed that the jury had answered a question different from what it was plainly asked. Second, the judge made no mention of the "suspense account" adjustment in asserting that the answer was a mistake. Rather, his assertion was based on supposed ambiguity in the question (Tr. 990, 993) and lack of evidence to support the verdict: "I don't know how they would have come up with the book value of that *company* at 135," (Tr. 995, emp. added). Furthermore, even if the numbers used by the jury to reach its verdict do add up now, in hindsight, after Eggett's counsel interviewed the jury and announced their thought process to the court of appeals, no such calculation or derivation was apparent to Judge Young when he read the verdict and immediately told the jury it was a "mistake." At that point in time, no "mistake" was possibly apparent. Therefore, Judge Young was not justified in *altering the question, after the jury had answered it*, to suit his own view of the evidence.[2]

B. Rule 47(r) Does Not Apply Absent Patent Error.

Rule 47(r), as properly construed and applied, allows for correction of only patent error in a jury verdict. By its terms, the rule authorizes correction of a verdict that is "informal or insufficient." As used in the rule, "informal" means "defective in form," or "not in the usual form"; while "insufficient" is defined as "inadequate for some need, purpose, or use." *Crowe v. Sacks*, 283 P.2d 689, 692 (Cal. 1955). A verdict is

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[2] In any event, Eggett's assertions regarding jurors' mental processes in reaching their verdict are inadmissible and cannot be relied upon to justify alteration of the verdict. *See* Utah R. Evid. 606(b); *Groen v. Tri-O-Inc.*, 667 P.2d 598, 603 (Utah 1983) (evidence that jury was confused or misunderstood facts or law is inadmissible); *State v. Gee*, 498 P.2d 662, 665-66 (Utah 1972) (jury's "process of reasoning in arriving at a verdict" is inadmissible).

"insufficient" only if it does not fully address the issues submitted. *Id.* at 692-93. This definition of "insufficient" was adopted in the leading Utah case of *Jorgensen v. Gonzales*, 383 P.2d 934 (Utah 1963), which limited its application to "patent error":

> [W]here it is *apparent* that there is some *patent error* in connection with the verdict, the court may of course call the matter to [the jury's] attention and direct them to redeliberate. [*Id.* at 935, emp. added.]

Based on this standard, *Jorgensen* approved the trial court's questioning of a *general* damage verdict in the "odd amount" of $1,131.51, which appeared to be an improper quotient verdict because general damages are typically stated in round numbers. The jury reconsidered and returned with a corrected verdict of $1,200. *Id.*

Subsequent cases have similarly limited application of Rule 47(r) to patent error in a verdict. For example, in *Brown v. Johnson*, 472 P.2d 942 (Utah 1970), the judge instructed the jury that special damages could not exceed $377.50, but the verdict awarded special damages of $10,000. The court advised the jury that "there appears on the face of [the verdict] an obvious error in view of the instructions." *Id.* at 945. This Court upheld correction of the error as "undoubtedly induced by failure on the part of the jury to understand the difference between the terms 'general damage' and 'special damage.'" *Id.* at 945. Similarly, in *Langton v. International Transport, Inc.*, 491 P.2d 1211(Utah 1971), a personal injury case, the court held that the verdict was "insufficient" because it manifestly failed to include amounts for pain and suffering and lost wages. *Id.* at 1214. The court distinguished between an "insufficient or informal verdict," which *can* be corrected pursuant to Rule 47(r), and "a verdict *regular on its face*, which awards

inadequate damages," that can be challenged *only by motion for new trial*. *Id.* at 1215 (emp. added). *See also Stevenett v. Wal-Mart Stores, Inc.*, 1999 UT App 80, ¶ 41, 977 P.2d 508 ("An informal or insufficient verdict under Rule 47(r) relates to the form of the verdict, not the sufficiency of the evidence supporting it . . . .").

A review of the verdict in this case reveals no insufficiency or patent error, as defined by the case law. Special Verdict Question 5 plainly asks for the "'book value' of Wasatch Energy"; it does not ask for Eggett's book value. That was to be calculated later by the parties. The jury's answer is not ambiguous, as it consists of a single number written in the blank space. The number provided, "$135,671.96," is not patently erroneous because, as shown above, it falls within the range of evidence produced by the parties and is consistent with the demand-to-award ratio of the compensation award, the derivation of which neither the parties nor the judge understood, but which they all accepted. (Tr. 995.)

Judge Young's real concern was that the jury's determination of Company book value was too low under his view of the evidence. After reading the verdict, the judge immediately asked a revised question, "[I]s this the value that the jury believes should be paid for the shares?" (Tr. 989.) That is plainly not what Question 5 asked. The jury foreman responded consistent with the verdict form, "We believe that to be the book value." (*Id.* at 990.) Judge Young persisted. After asserting that Question 5 was "confusing" and the verdict a "mistake," Judge Young again rephrased the question: "Is this the value that you think the corporation owes to Mr. Eggett to purchase his shares?"

(*Id.*) Again, that is plainly contrary to the verdict question. Following objections, the judge again rephrased his question, this time in a compound format asking whether Eggett was entitled to $135,671.96 or to 36 percent of that figure. (*Id.* at 992.) Following the judge's stated opinion and persistence, the jurors simply responded, "Yes." (*Id.* at 992-93.) The judge then expressed his understanding that Eggett should receive the full $135,671.96 and discharged the jury (*Id.* at 993.) In response to subsequent objections, Judge Young explained that the verdict was "inconsistent" with the evidence: "I don't know how they would have come up with the book value of that company at 135." (*Id.* at 935.)[3]

Thus, Judge Young altered the verdict question, after it was answered, not because of patent error, but because he did not consider the answer to be supported by his view of the evidence. In the absence of patent error, Judge Young had no authority or discretion to alter the verdict question pursuant to Rule 47(r), and without a motion for new trial, he had no right to make his own assessment of the evidence. *See, e.g., EFCO Distributing,*

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[3] Contrary to the assertion of the court of appeals (Slip Op. at ¶ 14), this procedure was not a "polling" of the jury in the accepted sense of asking the jurors if the written verdict is their verdict. *See* Rule 47(q). Rather, this was a blatant attempt by the trial court to *control* the verdict by altering the clear verdict question. Through his misleading compound question, Judge Young *coerced* the jury to accept and follow his view of the evidence, or at least created enough uncertainty to allow his own inference of jury intent to supplant the true verdict. Thus, the judge plainly failed to act "properly and discreetly in handling the situation." *See Jorgensen v. Gonzales, supra*, 383 P.2d at 936. *See also* 9 Moore's Federal Practice § 49.11[3][b] (3d ed. 2000) (acknowledging the preeminent position of the trial judge and how easily the judge's comments and demeanor can improperly influence or coerce the jury to reconsider its verdict).

This Court has previously reprimanded Judge Young for similar misconduct in criticizing or questioning jury verdicts. (Add. 81.)

Inc. v. Perrin, supra, 412 P.2d at 618 ("the court should not upset a verdict merely because it may disagree"); *First Security Bank v. Ezra C. Lundahl, Inc., supra*, 454 P.2d at 889 (the court may not make findings inconsistent with the jury's findings); *Langton v. International Transport, Inc., supra*, 491 P.2d at 1215 (verdict awarding inadequate damages can be challenged only by motion for new trial); *Brigham v. Moon Lake Electric Ass'n, supra*, 470 P.2d at 397 (court has no right to assess the sufficiency of evidence in the absence of a motion raising the issue). *See also Goddard v. Hickman*, 685 P.2d 530, 532 (Utah 1984) (a trial judge's "mere disagreement [with a verdict] is not sufficient reason to order a new trial"). The court of appeals completely misapplied Rule 47(r) by condoning, and even commending, Judge Young's interference with the jury's verdict. If this precedent is upheld, no jury verdict is safe from a judge who simply disagrees with the result.[4]

In summary, Rule 47(r) has no application to this case because the verdict contains no patent error. Therefore, the court of appeals erred in applying Rule 47(r) to affirm Judge Young's alteration of the jury verdict. If the Contract Book Value is not enforced, then certainly the Jury Book Value should be enforced.

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[4] The federal cases cited by the court of appeals do not support its conclusion. To begin with, there is no federal analogue to our Rule 47(r). The case of *Romano v. U-Haul Int'l*, 233 F.3d 655 (1st Cir. 2000), dealing with a verdict for "nominal damages" of $15,000, is a case of true patent error, while the present case is not. The case of *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186 (10th Cir. 1997), is distinguishable because the plaintiff there *requested* resubmission of the verdict, while Eggett did not. Here, the trial judge acted on his own, without any motion or objection invoking his assessment of the verdict.

POINT III: THE COURT OF APPEALS ERRED IN APPROVING UNAPPORTIONED ATTORNEY FEES UNDER THE PRETEXT OF A FAILED MARSHALING REQUIREMENT.

A. Fees At Trial.

Attorney fees may be awarded only if authorized by contract or statute. If based on contract, fees can be awarded only in accordance with the terms of the contract. *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). A party requesting attorney fees must "distinguish between work done that was subject to a fee award and work that was not." *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 269 (Utah 1992). Accordingly, the claimant's supporting affidavit must apportion fees between successful claims for which fees may be recovered and claims for which fees cannot be recovered. *Id.* at 269-70. *See also Foote v. Clark*, 962 P.2d 52, 55 (Utah 1998). Moreover, the trial court must document its award of fees with sufficiently detailed findings to support the allocation and award. *Id.*; *see also Miller v. Martineau & Co.*, 1999 UT App 216, ¶¶ 45-48, 983 P.2d 1107; *Schafir v. Harrigan*, 879 P.2d 1384, 1393-94 (Utah App. 1994) (denying fees because most related to claims for which fees were not recoverable).

In this case, Eggett claims entitlement to attorney fees pursuant to paragraph 19(c) of the Shareholders' Agreement: "In the event any legal action is required by a party to this Agreement to enforce the provisions of same, the prevailing party shall be entitled to recover its costs of suit, including reasonable attorneys' fees." (Add. 47.) However, Eggett's Complaint contains two major, separable claims: one for breach of the Employment Agreement by failing to pay due compensation, and one for breach of the

Shareholders' Agreement by failing to pay book value for Eggett's stock. (R. 1-5.) Accordingly, only the fees pertaining to the stock claim are recoverable by contract; fees related to the compensation claim are not recoverable.

The plaintiff's supporting affidavit makes no attempt to apportion fees between the stock claim and the compensation claim. (R. 287, Add. 65.) The affidavit merely makes the conclusory assertion that the stock and compensation claims are "inextricably intertwined" and that Eggett should be awarded fees for both claims. (Para. 10.) However, that assertion is unsupported by the record. The stock claim is based on the Shareholders' Agreement and turns on whether Eggett was terminated for cause and, if not, the proper determination of book value. (Tr. 152-69, 255-89.) The compensation claim turns on the existence and terms of a separate, written compensation agreement. (Tr. 170-255.) Accordingly, the claims are easily separable and were handled separately throughout discovery and trial, with clear demarcation in the questioning of witnesses on the two subjects at trial. (Eggett, Tr. 255; Keith Painter, Tr. 435; Curtis Chisholm, Tr. 542; Brian Watts, Tr. 607-08.) The two claims involved separate evidence and separate calculations of damages. (Tr. 254-55, 281-82, 893-94.) Because Eggett failed to apportion the fees for these separable claims, the attorney fee award must be set aside. *See, e.g., Valcarce v. Fitzgerald*, 961 P.2d 305, 318 (Utah 1998) ("trial court . . . may not award wholesale all attorney fees requested if they have not been allocated as to separate claims").

The Supplemental Judgment, awarding Eggett over $60,000 in attorney fees, contains entirely inadequate, and even misleading, findings to support the award. For example, the Supplemental Judgment recites that Eggett "has made a proper and reasonable segregation between those claims to which he is entitled to an award of costs, expenses, and fees, and those claims to which he is not entitled to such an award." (Page 2.) However, as noted above, the supporting affidavit makes *no apportionment at all* for recoverable and nonrecoverable fees. After stating that a proper segregation has been made, the judgment recites that all claims asserted are "so intertwined . . . that it is *not possible* to segregate or to distinguish them." (*Id.*, emp. added.) Because the fee judgment is purely conclusory, without adequate findings, it must be set aside. *See, e.g., Miller v. Martineau, supra*, at 1116-17.

The court of appeals refused to address the merits of this argument, relying on the pretext that Wasatch had failed to marshal the evidence in support of the fee award. Specifically, the court asserted that Wasatch had failed to provide the transcript and order from the attorney fee hearing. (Slip Op. at ¶ 41.) However, the court of appeals is in error, both as to the law and the record.

Wasatch is not challenging the sufficiency of evidence to support the attorney fee award; rather, it asserts that *no award* is permissible without the required apportionment in Eggett's supporting affidavit. This is a legal, not a factual, challenge. Accordingly, the marshaling requirement does not even apply. *See, e.g., Peirce v. Peirce*, 2000 UT 7, ¶ 17 n. 4, 994 P.2d 193 ("marshaling requirement applies only to challenges of factual

findings, not to conclusions of law"). Furthermore, the transcript of the hearing, which included no testimony, is not necessary to show that Eggett failed to apportion his attorney fees. That failure is evident from Eggett's attorney fee affidavits, which are not only in the record, but were attached to Wasatch's opening brief, *as was the Supplemental Judgment for attorney fees*. (Add. 19, 65.) It is evident that the court of appeals was simply searching for a quick and easy way around the argument, instead of addressing it directly, as a court is expected to do. The court's treatment of this issue thus deviates from the law and practice of prior cases.

B. Fees On Appeal.

To the extent Wasatch prevails on this appeal, it is entitled to recovery of its attorney fees and costs incurred on appeal, as well as to reduction of fees and costs awarded Eggett at trial. *See, e.g., Brown v. David K. Richards & Co.*, 1999 UT App 109, 978 P.2d 470, 479.

CONCLUSION

Based on the foregoing, this Court should reverse the judgment of the court of appeals. The court of appeals opinion reads more like a deferential defense of a judicial colleague than an objective review of legal issues. Contrary to the standard of review applied by the court of appeals, a trial judge has *no discretion* to ignore an unambiguous contract or to alter an unambiguous jury verdict. This precedent, if allowed to stand, invites no end to judicial mischief, blurring the proper roles of judge and jury. The court of appeals opinion perpetuates an injustice and approves unwarranted deviations from

existing law and procedure. Accordingly, this Court should enter judgment for the Contract Book Value of $27,540 or, alternatively, for the Jury Book Value of $49,520. In addition, the Court should vacate the award of attorney fees and costs at trial and award Wasatch attorney fees and costs on appeal.

Respectfully submitted this 4th day of January, 2002.

KIRTON & McCONKIE

By: _____

Eric C. Olson
Merrill F. Nelson
Attorneys for Defendant/Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **Brief of Petitioner** to be mailed through United States mail, postage prepaid, this 4th day of January, 2002, to the following:

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ADDENDUM

Index

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IN THE UTAH COURT OF APPEALS

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Roger K. Eggett, Jr., an individual, Plaintiff and Appellee, v. Wasatch Energy Corporation, a Utah corporation, Defendant and Appellant.	OPINION (For Official Publication) Case No. 20000079-CA F I L E D (July 19, 2001) 2001 UT App 226

Third District, Salt Lake Department
The Honorable David S. Young

Attorneys: Merrill F. Nelson and Eric C. Olson, Salt Lake City, for Appellant
Perrin R. Love, Salt Lake City, for Appellee

Before Judges Greenwood, Billings, and Thorne.

THORNE, Judge:

¶1 Defendant Wasatch Energy Corporation (Wasatch) appeals from a final judgment awarding plaintiff Roger K. Eggett, Jr. (Eggett) $147,559.96 and attorney fees. We affirm.

BACKGROUND

¶2 In 1993, Eggett formed Wasatch to market and distribute natural gas, as well as to purchase, pool, and resell natural gas from producers too small to efficiently do so themselves. On April 13, 1995, Eggett entered into a Shareholder Agreement with two Wasatch employees, Todd Cusick (Cusick) and Curtis Chisholm (Chisholm). The Shareholder Agreement identified Eggett as Wasatch's president. The Shareholder Agreement also set forth each shareholder's allotted shares of Wasatch stock.

¶3 The terms of the Shareholder Agreement, specifically, paragraph no. 2, provided that should a shareholder separate from the corporation, the remaining shareholders would have the option

to purchase that shareholder's corporate stock. The remaining shareholders, as per the Shareholder Agreement, would either purchase the stock for "book value," if the separating shareholder voluntarily left the corporation, or for "par value" if the shareholder was terminated for cause. The Shareholder Agreement defined "book value" as the shareholder's net equity in the corporation, which would be determined by Wasatch's certified year-end financial statements. The Shareholder Agreement defined "par value" as the original price the shareholder paid for the stock.

¶4 In April 1995, Wasatch teamed with Magna Energy International (MEI) to expand Wasatch's business. At MEI's urging, two MEI representatives joined Wasatch's Board of Directors (the Board), which was formerly comprised of Eggett, Cusick, and Chisholm. Eggett, as Wasatch's president, retained personal control over operating expenditures, but a four-fifths majority of the Board was required to approve payroll, debt, and/or equity decisions.

¶5 In April 1997, Eggett tendered his resignation to the Board, effective July 14, 1997. Eggett's decision to resign was prompted by a series of disputes with Wasatch concerning the corporation's management structure, financial decisions, and Eggett's salary. As per the Shareholder Agreement, Eggett offered his corporate stock to the remaining shareholders "for the audited [b]ook [v]alue as of June 30, 1997," the date of Wasatch's fiscal year-end audit.

¶6 On May 1, 1997, after Eggett had tendered his resignation, Wasatch changed Eggett's employment status to a consultant. Wasatch also began conducting an audit of corporate accounts, including Eggett's expense account. The auditors, as evidenced in their report, concluded that Eggett had taken unauthorized compensation and reimbursements for personal expenses.

¶7 On May 16, 1997, Wasatch terminated Eggett for cause. Subsequently, as per the Shareholder Agreement, Wasatch tendered Eggett a check for the par value of his corporate stock, totaling $1,217. Eggett refused the tender, and Wasatch cancelled Eggett's corporate shares on its books.

¶8 On September 9, 1997, Eggett brought suit against Wasatch for (1) breach of his Employment Agreement with Wasatch, (2) breach of the Shareholder Agreement, and (3) breach of the covenant of good faith and fair dealing. In his complaint, Eggett sought compensation from Wasatch through his resignation date of July 14, 1997. Eggett also sought the book value for his shares of corporate stock, alleging that his for cause termination by Wasatch was a "sham." In response, Wasatch

counterclaimed, alleging the following: (1) breach of fiduciary duties, (2) breach of the Employment Agreement, and (3) conversion of corporate assets.

¶9 At trial, Eggett testified that to determine the book value of his stock shares, "you take the equity of the company and you multiply it by my ownership interest which was 36.5%, so we have to determine the amount of ownership equity that was in the company." The parties agreed that determining stockholder equity would be accomplished by adding Wasatch's retained earnings to the stockholders' capital contribution.

¶10 Wasatch argued that its retained earnings, according to Wasatch's audited financial statements for June 30, 1997, totaled $57,703. When its retained earnings were added to the stockholders' capital contributions, the ownership equity totaled $75,452. Multiplying that figure by 36.5%, Wasatch argued that the book value of Eggett's shares was $27,540.

¶11 Eggett, however, argued that Wasatch's June 30, 1997 retained earnings should be adjusted to include the following: (1) $618,000 from a litigation "reserve fund" for a lawsuit involving United Utilities; (2) a $283,000 reserve for anticipated losses on a "swap contract," which did not occur; (3) $296,252 for "suspense items," which included uncertain earnings or credits held in suspense on Wasatch's books; and (4) $45,533 for a disputed purchase contract with Grynberg Energy. Ultimately, Eggett withdrew his claim to the $618,000 litigation reserve, resulting in a claimed total retained earnings of $682,000. That figure coupled with the stockholders' capital contributions, brought the claimed book value of Eggett's shares of corporate stock to $255,419.

¶12 On November 10, 1999, the matter was submitted to a jury. Following deliberations, the jury awarded Eggett $11,888.35 for "additional compensation . . . for the period from January 1, 1997, through May 1, 1997, and $135,671.61, as book value for his shares of stock in Wasatch."[1] Prior to discharging the jury and final entry of the judgment, the trial court had the following exchange with the jury foreperson concerning the book value of Eggett's shares of Wasatch stock:

> The Court: Question 5. On the date for evaluation of the shares you selected above, what was the book value of Wasatch . . . as

---

1. Following a hearing on attorney fees, the trial court awarded Eggett nearly $60,000 in attorney fees in addition to the jury award.

defined by the shareholders agreement? That, the answer is $135,671.61.

. . . .

The Court: Do I understand, Mr Robertson [jury foreperson], that the jury's decision, as I've read this question number, is this the value that the jury believes should be paid for the shares?

Mr. Robertson: We believe that to be the book value.

The Court: And so-

Mr. Robertson: Paid for the shares.

The Court: So, from the, I think the question was confusing and that's why I wanted to ask that question. The book value would be the value from which--yes, did you have a question?

Mr. Stevens (Wasatch's counsel): It seems rather inappropriate to be coming up with questions for the jury at this time. The question is as it's stated and it's answered as it's answered.

The Court: Well, I'm not going to allow that to stand if it is a mistake. So, if I can find that out now, I will find that out now.

The Court: What you're saying by that, let me just be sure that I understand what we're talking about. Is this the value that you think [Wasatch] owes to Mr. Eggett to purchase his shares?

Mr. Robertson: Yes

The Court: All right. Now I'm going to ask that question of all of you as jurors if you concur in that determination. Let me go through.

The Court: Do either of you [the parties' attorneys] desire that I poll the jury on any other questions?

¶13 Following the trial court's final question, Wasatch's counsel requested a sidebar wherein the following colloquy occurred:

> Mr. Stevens: Your Honor, the way this question is worded and the way this has been argued has been entirely talked about, at least from our point of view, (inaudible) book value of the company is. We know that . . . Eggett has 36.5%. That's the number that should be applied here. To have them now-
>
> The Court: Okay, I'm not going to allow that and you can make a record of it but I'm not going to allow it. I don't believe it's consistent with their desire.
>
> Mr. Stevens: And it's certainly not consistent with what they've just said.
>
> The Court: That's exactly right and so- we'll make a record of it and that's just fine.

¶14 Upon completion of the sidebar, the trial judge continued with his questioning of the jury,

> The Court: Okay. I'm going to poll the jury on particularly question number 5. The question, here's the problem and I want to just explain it to the jury so that I get a clear understanding of what your decision is.
>
> We know from the facts of this case that . . . Eggett owns 36.5%. If I interpret your answer to this question to be $135,000 for book value. That would mean that he would be entitled to 36.5% of $135,000.00. If I understand it the way I have now asked you the question, he is entitled to $135,671.61 which is a number that you have come to by some calculation method for the purchase of his shares of stock. So, in other words, this figure, $135,000, is a representative smaller figure due to him which represents 36 percent of X which is the larger number. All right?

> Now, I want to be sure that I understand that correctly and if any of you disagree with that, I want to know that.

The court then polled the jury, all of whom agreed with the trial court's interpretation of question no. 5. The court then concluded:

> The Court: All right. Okay, I'm going to enter, well, we have the record and we have indicated on the record what my understanding is. This question [number 5], I find, is ambiguous in its right and the way it was written and that the jury was [sic] spoken that the value is due to . . . Eggett is for lost compensation, $11,888.00 and for his shares of stock, $135,671.61. That means that from this decision of the jury that those two numbers combined would . . . $147,559.96.

¶15 Following the completion of the trial, based upon affidavit, the trial court awarded Eggett attorney fees. This appeal followed.

ISSUES AND STANDARDS OF REVIEW

¶16 Wasatch argues the trial court erred by admitting extrinsic evidence to supplement the Shareholder Agreement, concerning Wasatch's retained earnings for June 30, 1997. When reviewing a trial court's decision to admit evidence we seek to determine whether the trial court exceeded its permitted range of discretion. See Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc., 889 P.2d 445, 455 (Utah Ct. App. 1994) (stating "the trial court did not abuse its discretion in admitting the above evidence").

¶17 Next, Wasatch argues the trial court erred by clarifying special verdict question no. 5 and the jury's response to that question. When reviewing a trial court's decision to clarify a jury verdict we seek to determine whether the trial court exceeded its permitted range of discretion. See Jorgensen v. Gonzales, 14 Utah 2d 330, 332-33, 383 P.2d 934, 935-36 (1963) (stating the trial court acted within "its prerogative" by "question[ing] the jury foreman about the possibility of a quotient or chance verdict"); see also Romano v. U-Haul Int'l, 233 F.3d 655, 671 (1st Cir. 2000) (stating "[t]he standard of review for a determination of resubmission of special verdict questions is for abuse of discretion"); Unit Drilling Co. v.

Enron Oil & Gas Co., 108 F.3d 1186, 1192 (10th Cir. 1997) (stating "it was an abuse of discretion for the trial court to refuse to ask the jury to clarify its verdict"); Newcomber v. Weyerhaeuser Co., 614 P.2d 705, 708 (Wash. Ct. App. 1980) (stating "[a] trial court is empowered to make such inquiry of the jury as is necessary to clear up a misunderstanding without first sending the entire case back for consideration" (emphasis added)).

¶18 Finally, Wasatch argues the trial court erred by awarding Eggett attorney fees because Eggett's counsel did not properly apportion out his nonrecoverable fees, and the trial court failed to support its ruling with supporting findings of fact. We do not reach the merits of this portion of Wasatch's claim because Wasatch has failed to satisfy the marshaling of evidence requirement. See Moon v. Moon, 1999 UT App 12,¶24, 973 P.2d 431 (stating "[w]hen an appellant fails to meet the 'heavy burden' of marshaling the evidence, . . . we 'assume[] the record supports the findings of the trial court'" (citation omitted)).

ANALYSIS

I. Admissibility of Adjustments to Wasatch's June 30, 1997 Retained Earnings

¶19 Wasatch argues that the adjustments to the certified year-end audit determining Wasatch's retained earnings for June 30, 1997, are extrinsic evidence used by Eggett to vary the unambiguous terms of the Shareholder Agreement to establish the book value of the corporate stock.[2] Accordingly, Wasatch argues that the trial court erred in admitting that evidence, because extrinsic evidence may not be used to supplement or alter the terms of an unambiguous contract.

¶20 Although we agree with Wasatch that extrinsic evidence is not generally admissible to vary the terms of an otherwise unambiguous contract, see Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co., 899 P.2d 766, 770 (Utah 1995), we find no reason why this otherwise relevant evidence[3] may not be offered in

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2. The Shareholder Agreement states that "'Book Value' shall mean the consolidated net shareholders' equity of the Corporation determined as of the end of each [fiscal year] as certified to by the firm of independent public accountants then regularly employed by the Corporation." (Alteration in original.)

3. See Utah R. Evid. 401 ("'Relevant evidence'" means evidence (continued...)

support of Eggett's claim for breach of the covenant of good faith and fair dealing. Indeed, Wasatch makes no argument why this evidence should not be admitted in support of Eggett's good faith claim.

¶21 In Olympus Hills, Olympus Hills brought suit against Smith's for breach of the covenant of good faith and fair dealing. The case arose because Smith's, an anchor tenant at the Olympus Hills center, relocated its supermarket and opened a "warehouse box store" in its place. Olympus Hills, 889 P.2d at 448. Smith's argued that its opening the "warehouse box store" satisfied the terms of its lease, which required Smith's to operate "any lawful retail selling business." Id.

¶22 At trial, Olympus Hills presented evidence that customer traffic at the center decreased when Smith's relocated the supermarket and opened the "warehouse box store." Id. at 454. Olympus Hills also presented evidence that the decrease in customer traffic adversely affected its tenants. See id.

¶23 Smith's, on the other hand, argued that the evidence was "irrelevant and highly prejudicial," id., claiming that "the 'lease obligate[d] Smith's to run a business in that space and not to generate a lot of traffic for this center.'" Id. The trial court concluded that "although the testimony was not admissible as to a contractual duty by Smith's under the lease to generate traffic, it was relevant to determining whether Smith's had breached its covenant of good faith and fair dealing." Id. (emphasis added).

¶24 We determined that "the traffic evidence is relevant to whether Smith's breached its covenant of good faith and fair dealing[, because] . . . Smith's was obligated, in good faith, to choose a business to operate in the leased space." Id. Accordingly, we concluded that the trial court did not "abuse[] its discretion in admitting the evidence." Id. at 456.

¶25 In the present matter, Wasatch argues the trial court erred by "admitting Eggett's adjustments to company book value contrary to the parties' clear agreement that the audited financial statement conclusively established book value." Wasatch does not, however, explain why such evidence is not admissible to prove Eggett's claim for breach of the covenant of good faith and fair dealing. Indeed, the trial court alluded to possible bias

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3. (...continued)
having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable.").

by Wasatch in omitting the adjustments in its retained earnings for June 30, 1997:

> The Court: Okay. The Court has already indicated to you that it's the Court's view that the generally accepted accounting principles may be affected by discretionary calls within the management or others in the corporation and thus I believe that the plaintiff should have the opportunity to present adjustments to that statement. [Eggett is] not going to be specifically bound to the audited statement of June 30 or the unaudited statement of December, [19]96, the June 30, [19]97, for the reason that after his termination by the corporation financial decisions that are discretionary may be made and the making of those discretionary decision[s] can affect his value should the corporation elect those decisions obviously inconsistent with his benefit. And, thus, he should be allowed to challenge that and show that reasonable adjustments should be made to the financial statements as then audited because of the, let's say, bias that had been incorporated by discretionary calls of the officers.

(Emphasis added.)

¶26 We conclude that although the adjustments may be extrinsic evidence and not admissible to vary the terms of the Shareholder Agreement, they are "relevant to determining whether [Wasatch] had breached its covenant of good faith and fair dealing," Olympus Hills, 889 P.2d at 454, which is inherent in every contract, see Malibu Inv. Co. v. Sparks, 2000 UT 30,¶19, 996 P.2d 1043, by not including the adjustments in its June 30, 1997 retained earnings. Accordingly, we find the trial court did not exceed its permitted range of discretion in admitting the above evidence. See Olympus Hills, 889 P.2d at 455.

II. Clarification of Special Verdict Question No. 5 and the Jury's Response to that Question

¶27 Next, Wasatch argues the trial court "erred by altering the special verdict question to interpose its own view of the evidence after the jury had rendered its verdict." We disagree.

¶28 Utah Rule of Civil Procedure 47(r) states that "[i]f the verdict rendered is informal or insufficient, it may be corrected

by the jury under the advice of the court, or the jury may be sent out again." Id. Further, in Jorgensen, our supreme court explained:

> [W]here it is apparent that there is some patent error in connection with the verdict, the [trial] court may of course call the matter to the[] [jury's] attention and direct them to redeliberate. In that regard it has been held, sensibly and properly, that where an amount is erroneously included the court may direct the jury to retire and correct it. The trial court appears to have acted not only within its prerogative but properly and discreetly in handling the situation.

Id. at 935-36.

¶29 We find additional case law from other jurisdictions regarding the clarification of jury verdicts persuasive. In Romano v. U-Haul Int'l, 233 F.3d 655 (1st Cir. 2000), the jury returned a verdict in favor of the plaintiff, awarding her $0 in compensatory damages, $15,000 in nominal damages, and $625,000 in punitive damages. See id. at 661. The trial court "surmised that the jury probably confused nominal with compensatory damages and proposed resubmitting the two questions, after repeating the jury instructions, to the jury." Id. at 670-71.

¶30 Following the trial court's resubmission of the two questions and the jury instructions, the jury asked the trial court if only $1 could be awarded in nominal damages. See id. at 661 The jury then proceeded to award the plaintiff $15,000 compensatory damages and $0 in nominal damages. See id. The defendant appealed the resubmission of the interrogatories back to the jury. See id.

¶31 On appeal, the First Circuit explained that "[t]he standard of review for a determination of resubmission of special verdict questions is for abuse of discretion." Id. at 671. The court then explained that the trial court's "decision to resubmit the two questions and allow the jury an opportunity to correct its mistake" was not an abuse of discretion. Id. at 672. The court concluded:

> The [trial] court's interpretation of the jury's verdict made logical sense. It did not take the decision-making role away from the jury and gave the jury a second chance to render a proper verdict. The [trial] court was clear in its instruction of what appellee

> needed to prove in order to be entitled to compensatory damages. . . . The jury was not forced or coerced by the judge into reversing the nominal and compensatory damage awards.

Id. at 672.

¶32 In Unit Drilling Co. v. Enron Oil & Gas Co., 108 F.3d 1186 (10th Cir. 1997), the Tenth Circuit concluded that the trial court abused its discretion by refusing the plaintiff's request to ask the jury to clarify its damage awards. See id. at 1191. The court explained that "we approve[] [of] the practice of asking the jury to clarify its meaning when the [trial] court is faced with an ambiguous verdict." Id. "'[P]ermitting questioning of jurors . . . promotes the value of judicial economy; otherwise, in the event of an ambiguity the court would be left with no other remedies than to order a new trial, even though a simple inquiry could clear up questions about how to read the damages verdict.'" Id. (quoting Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1548 (10th Cir. 1993)). Finally, the court reasoned that "ordering a new trial . . . takes the case away from the jury that heard the case and that could decide it if given a chance to cure the ambiguity." Id. at 1192.

¶33 In the present matter, both parties were permitted to argue (1) what amount constituted Wasatch's retained earnings for June 30, 1997, and (2) what the book value was for Eggett's Wasatch shares. Wasatch argued that its June 30, 1997 retained earnings were $57,703, and the stockholders' capital contributions totaled $75,452. As such, Wasatch argued that the book value for all Wasatch stock was $133,155, and Eggett's shares, 36.5%, were book valued at $27,540.

¶34 Eggett, on the other hand, argued that the adjustments should be included in the June 30, 1997 retained earnings, bringing Wasatch's retained earnings to $682,000. As such, Eggett argued that the total book value for Wasatch stock was $757,452, and Eggett's shares, 36.5%, were book valued at $255,419.

¶35 In light of these arguments, the trial court could have surmised "that there [wa]s some patent error in connection with the verdict," Jorgensen, 383 P.2d at 935, when the jury responded to special verdict question no. 5 and awarded Eggett

$135,671.61.[4] If so, the trial court would have "acted . . . within it[s] prerogative." Id.; see also Utah R. Civ. P. 47(r).

¶36 First, assuming question no. 5 requested that the jury determine the book value for all of Wasatch's stock, neither Wasatch's nor Eggett's figures results in the jury's figure of $135,671.61. Although Wasatch's figure is close, that further strengthens the possibility that there might have been an error in arriving at the figures. Second, assuming the question required the book value for only Eggett's shares, neither Wasatch's nor Eggett's figures coincide with the jury's figure.

¶37 Third, and the most likely explanation, the trial judge, being intimately familiar with the figures argued during four days of trial, realized that the jury chose only to include a portion of the adjustments requested by Eggett in its calculations of Wasatch's June 30, 1997 retained earnings. Indeed, Wasatch's year-end audited financial statements, $75,452, plus the $296,252 "suspense account," combine to total $371,704, which if multiplied by 36.5%, totals $135,671.61, the exact figure the jury awarded.

¶38 To alleviate any possible confusion, the trial judge, having (1) reread the question to the jury foreperson, (2) determined that the question was confusing, and (3) informed Wasatch's counsel that he would not let the question stand if it was confusing, made the following inquiry of the jury:

> The Court: We know from the facts of this case that . . . Eggett owns 36.5%. If I interpret your answer to this question to be $135,000 for book value. That would mean that he would be entitled to 36.5% of $135,000.00. If I understand it the way I have now asked you the question, he is entitled to $135,671.61 which is a number that you have come to by some calculation method for the purchase of his shares of stock. So, in other words, this figure, $135,000, is a representative smaller figure due to him which represents 36 percent of X which is the larger number. All right?

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4. Special verdict question no. 5 states that "[o]n the date for evaluation of the shares that you selected above, what was the 'book value' of Wasatch . . . as defined by the . . . Shareholder Agreement?"

> Now, I want to be sure that I understand that correctly and if any of you disagree with that, I want to know that.

¶39 Based on the above inquiry and our review of the record, we conclude that the trial court's questions to the jury regarding its response to question no. 5 neither "forced" nor "coerced" the jury to alter its verdict. Romano, 233 F.3d at 672. Further, we conclude that the trial court's actions "did not take the decision-making role away from the jury," id., but gave the jury the opportunity "to render a proper verdict." Id.

¶40 Finally, we agree with the rationale set forth in both Romano and Unit Drilling that permitting the trial court to question the jury regarding an ambiguous verdict promotes judicial economy and alleviates the need for a new trial when a simple inquiry may cure the ambiguity. Indeed, we commend the trial judge's thoroughness and attention to detail. Trial judges, when faced with similar situations, should have the latitude to ask questions in order to determine the true verdict of the jury. Accordingly, we conclude that the trial court properly exercised its discretion in clarifying special verdict question no. 5 and the jury's response to that question.

III. Attorney Fees

¶41 Finally, Wasatch argues the trial court erred in awarding Eggett attorney fees because Eggett's counsel failed to apportion the recoverable and nonrecoverable fees. However, our review of the record reveals that Wasatch failed to marshal the evidence the trial court relied upon in awarding Eggett his attorney fees. Indeed, Wasatch neither provided this court with a transcript from the trial court's hearing on March 24, 2000, concerning attorney fees, nor any order from that hearing.

¶42 In Moon v. Moon, 1999 UT App 12, 973 P.2d 431, we explained,

> "The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The

> gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous."

Id. at ¶24 (citation omitted).

¶43 Further, "[w]hen an appellant fails to meet the heavy burden of marshaling the evidence, . . . we assume[] the record supports the findings of the trial court." Id. (internal quotations and citations omitted). Here, Wasatch failed to satisfy the marshaling requirement. Therefore, "we assume[] the record supports the findings of the trial court" and its decision to award Eggett his requested attorney fees. Id. (internal quotations and citation omitted).

CONCLUSION

¶44 We conclude that the trial court did not exceed its permitted range of discretion in admitting evidence of adjustments to Wasatch's June 30, 1997 retained earnings. Further, we conclude that the trial court did not exceed its permitted range of discretion by clarifying special verdict question no. 5 and the jury's response to that question. Finally, we affirm the trial court's decision to award Eggett attorney fees.

¶45 The judgment of the trial court is therefore affirmed.

William A. Thorne, Jr., Judge

¶46 WE CONCUR:

Pamela T. Greenwood,
Presiding Judge

Judith M. Billings, Judge

IN THE UTAH COURT OF APPEALS

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Roger K. Eggett, Jr., an individual, Plaintiff and Appellee, v. Wasatch Energy Corporation, a Utah corporation, Defendant and Appellant.	ORDER Case No. 20000079-CA

This matter is before the court upon appellee's petition for rehearing, filed July 20, 2001. Appellant filed a response on August 14, 2001.

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 3 day of August, 2001.

FOR THE COURT:

William A. Thorne, Judge

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY STATE OF UTAH

ROGER K. EGGETT, JR., an individual, Plaintiff, vs. WASATCH ENERGY CORPORATION, a Utah Corporation, Defendants.	**JUDGMENT** Civil No. 97-0906444 Judge David S. Young

This action came on for trial beginning November 3, 1999, before the Court and jury, the Honorable Judge David S. Young, District Court Judge, presiding. Plaintiff was represented by Perrin R. Love of Clyde, Snow, Sessions & Swenson. Defendant was represented by Robert L. Stevens of Richards, Brandt, Miller & Nelson.

The parties concluded the presentation of evidence and rested their cases on November 10, 1999. Following instruction as to the law to be applied and closing arguments by counsel, the jury

retired to deliberate, make findings of fact, and answer special interrogatories in a Special Verdict Form, which is incorporated herein by reference.

On November 10, 1999, after due deliberation, the jury returned in open court the following verdict:

The total amount of additional compensation to be awarded to Roger Eggett for the period from January 1, 1997, through May 1, 1997:	$ 11,888.35
The total amount to be awarded to Roger Eggett as book value for his shares of stock in Wasatch Energy Co.:	$ 135,671.61
Total amount to be awarded to Roger Eggett:	$ 147,559.96

As the Court read the Special Verdict Form, the Court polled the jury to determine whether the figure of $135,671.61 represented the book value of Roger Eggett's shares of stock (which the evidence showed was 36.5 per cent of the total number of outstanding shares), or the book value of Wasatch Energy in total. Each of the eight jurors stated affirmatively that $135,671.61 was the book value of Roger Eggett's shares, and was the amount to be awarded to Roger Eggett.

Based upon the jury verdict, the Court found Roger Eggett to be the prevailing party in this action.

NOW THEREFORE, based upon the verdict of the jury and good cause otherwise appearing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of plaintiff Roger Eggett and against defendant Wasatch Energy Co., in the amount of $147,559.96, together with prejudgment interest accruing at a rate provided by law from November

11, 1999, the date following the jury award, until the date this Judgment is entered, and post-judgment interest from the date that this Judgment is entered until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that plaintiff Roger Eggett may submit to this Court a Memorandum of Costs pursuant to Utah R. Civ. P. 54(d), and an affidavit of attorneys' fees and expenses. After defendant has an opportunity to respond, the Court will consider any submissions by plaintiff, and enter a supplemental judgment, if appropriate.

DATED this 10 day of January, ~~1999~~ 2000.

BY THE COURT:

David S. Young
District Court Judge

objections
Denied

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY STATE OF UTAH

ROGER K. EGGETT, JR., an individual, Plaintiff, vs. WASATCH ENERGY CORPORATION, a Utah Corporation, Defendants.	SUPPLEMENTAL JUDGMENT Civil No. 97-0906444 Judge David S. Young

Judgment was entered in this matter on January 11, 2000, and is incorporated by reference. Plaintiff Roger Eggett moves for entry of a Supplemental Judgment against defendant Wasatch Energy Corp. In consideration of the motion, the Court has reviewed the following:

a. Affidavit of Perrin R. Love in Support of Award of Costs, Expenses and Attorney's Fees, dated December 6, 1999;

b. Wasatch Energy Corp.'s Memorandum in Opposition to Plaintiff's Motion for Award of Attorneys Fees, dated December 16, 1999;

c. Reply Affidavit of Perrin R. Love in Support of Award of costs and Attorney's Fees, dated December 23, 1999;

d. Supplemental Affidavit of Perrin R. Love in Support of Award of Costs, Expenses and Attorney's Fees, dated January 13, 2000;

e. Plaintiff's Verified Memorandum of Taxable Costs dated December 23, 1999; and

f. Defendant's Motion to Tax Costs, dated January 3, 2000.

g. Second Supplemental Affidavit of Perrin R. Love in Support of Award of Costs, Expenses and Attorney's Fees, dated March 24, 2000.

The Court heard argument on the matters raised by these pleadings on March 24, 2000. Plaintiff Roger Eggett was represented by Perrin R. Love of Clyde, Snow, Sessions & Swenson. Defendant Wasatch Energy Corp. was represented by Robert L. Stevens of Richards, Brandt, Miller & Nelson.

Based upon the submissions of the parties, the arguments of counsel, and good cause appearing, the Court finds that plaintiff Roger Eggett is entitled to an award of costs, expenses, and attorneys' fees in the amount of $60,374.43. The Court finds that these costs, expenses, and fees are reasonable. The Court also finds that plaintiff Roger Eggett has made a proper and reasonable segregation between those claims to which he is entitled to an award of costs, expenses, and fees, and those claims to which he is not entitled to such an award. Specifically, the Court finds that (1) the claims brought by Mr. Eggett to recover book value for his shares pursuant to his Shareholder Agreement were the predominant claims at trial; (2) the facts to be discovered and tried on Mr. Eggett's claims pursuant to the Shareholder Agreement are so intertwined with the facts to be discovered and tried on the other claims and counterclaims that it is not possible to segregate or to distinguish them. Accordingly, the Court finds that it is proper and reasonable to segregate those costs, expenses, and fees incurred by Mr. Eggett before May 16, 1997, from those costs, expenses,

and fees incurred by Mr. Eggett after May 16, 1997, when Mr. Eggett's claims under the Shareholder Agreement arose.

NOW THEREFORE, based upon the submissions of the parties, the arguments of counsel, and good cause appearing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Supplemental Judgment is entered in favor of plaintiff Roger Eggett and against defendant Wasatch Energy Corp., as follows:

Costs, Expenses, and Attorney's Fees	$60,374.43
Prejudgment interest from November 11, 1999 through January 10, 2000, on the Judgment amount of $147,559.96	$ 2,466.07

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that plaintiff Roger Eggett is awarded postjudgment interest at an annual rate of 7.67 per cent on the Judgment amount of $147,559.96 from January 11, 2000, until paid. Plaintiff Roger Eggett is awarded postjudgment interest at an annual rate of 7.67 percent on the Supplemental Judgment amount of $60,374.43 from the date that this Supplemental Judgment is entered until paid.

Pursuant to Utah R. Civ. P.54(d), the Court taxes costs in the amount of $ 2,157.08. These costs are included in the award of $60,374.43, and are not a separate award.

DATED this 7th day of April, 2000.

BY THE COURT:

David S. Young
Third District Court Judge

Approval as to form:

Robert L. Stevens
Richards, Brandt, Miller & N[illegible]

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY STATE OF UTAH

ROGER K. EGGETT, JR., an individual, Plaintiff, vs. WASATCH ENERGY CORPORATION, a Utah Corporation, Defendants.	SPECIAL VERDICT FORM Civil No. 97-0906444 Judge David S. Young

WE THE JURORS empaneled in the above-captioned case find the issues of fact and answer the special Interrogatories to us as follows:

I. EGGETT'S CLAIMS

1. Do you find that Wasatch Energy breached its agreements or obligations to Roger Eggett by not paying Mr. Eggett the full amount of compensation to which he was entitled for all or any part of the period from January 1, 1997 through May 1, 1997.

ANSWER: Yes X No _____

2. If the answer to Question No. 1 is "yes", what is the total amount of additional compensation that Wasatch Energy owes to Roger Eggett for all or part of the period from January 1, 1997 through ~~July 14, 1997~~ May 1, 1997?

$ 11,888.00

3. Do you find that Wasatch Energy breached its agreements or obligations to Roger Eggett, by terminating Roger Eggett for cause and not paying him book value for his shares of stock?

ANSWER: Yes X No _____

If you answered question no. 3 "yes," answer question no.s 4 and 5. If you answered question no. 3 "no," skip to question no. 6.

4. Under the SHAREHOLDERS AGREEMENT between the parties, on what date was the book value of Eggett's shares to be determined after he resigned? (Check one).

_____ June 30, 1996

_____ December 31, 1996

X June 30, 1997

5. On the date for evaluation of the shares that you selected above, what was the "book value" of Wasatch Energy as defined by the Shareholders Agreement?

$ 135,671.96

Answer this question only if you answered either question no. 1 as "YES" or question no. 3 as ~~"NO"~~ "YES".

6. Do you find by clear and convincing evidence that the acts or omissions of Wasatch Energy, as alleged by Eggett, were the result of willful and malicious or intentional fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward and disregard of the rights of others?

ANSWER: Yes _____ No X

II. WASATCH ENERGY CLAIMS

7. Do you find that Roger Eggett breached his fiduciary duties and/or breached his compensation and reimbursement agreements with Wasatch by receiving unauthorized compensation or abusing his expense account?

ANSWER: Yes _____ No X

8. If your answer to question no. 7 is "YES," what is the amount of excessive compensation or expense account reimbursement that was received by Roger Eggett in the following years:

1995	$ _____
1996	$ _____
1997	$ _____
TOTAL	$ _____

If you answered question no. 7 as "YES" answer the following question.

9. Do you find by clear and convincing evidence that the acts or omissions of Roger Eggett as claimed by Wasatch Energy were willful and malicious or intentionally fraudulent or manifested a knowing and reckless indifference toward and disregard the rights of others such that punitive damages should be awarded?

ANSWER: Yes _____ No _____

DATED this 10 day of November, 1999.

Mark A Roberts
Foreperson of the Jury

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROGER K. EGGETT, JR.,	:	Case No. 970906444
Plaintiff,	:	
	:	Volume IV of IV
v	:	
WASATCH ENERGY CORPORATION.,	:	
Defendant.	:	

TRIAL HELD NOVEMBER 3, 4, 5, and 10, 1999

BEFORE

THE HONORABLE DAVID S. YOUNG

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
652 Jefferson Cove
Sandy, Utah 84070
801-567-1157

MR. LOVE: They sent me down (inaudible) to figure out which was which, we could only come up with one copy.

THE COURT: Had I known that, I would have had the clerk make some while we were waiting. Do you want to step up here and just do this. Okay. The record may show, we're returning to the record at the request of counsel without the jury present.

Mr. Stevens.

MR. STEVENS: Your Honor, this is my motion for a partial dispositive ruling at the conclusion of the evidence. The ruling I'm asking for with regard to the value of shares and book value I think Mr. Eggett testified that he understood it to be a June 30 date that was intended and we agreed with that. We have an audited statement that has specific dates. The agreement requires that it be the audited statement from the auditors and the accrual and general accepted accounting practices and such. Therefore, we feel that that is the number that should be in here and that should not be left to the jury.

THE COURT: Okay. And I've already indicated to you -- well, first let me ask Mr. Love. Do you desire to respond on the record?

Mr. Love? Do you desire to respond to that?

MR. LOVE: I would just rest on what I said

earlier, your Honor.

THE COURT: Okay. The Court has already indicated to you that it's the Court's view that the generally accepted accounting principles may be affected by discretionary calls within the management or others in the corporation and thus I believe that the plaintiff should have the opportunity to present adjustments to that statement. He's not going to be specifically bound to the audited statement of June 30 or the unaudited statement of December, '96, the June 30, '97, for the reason that after his termination by the corporation financial decisions that are discretionary decisions may be made and the making of those discretionary decision can affect his value should the corporation elect to make those decisions obviously inconsistent with his benefit. And, thus, he should be allowed to challenge that and show that reasonable adjustments should be made to the financial statements as then audited because of the, let's say, bias that had been incorporated by discretionary calls of the officers. Okay?

MR. STEVENS: Thank you.

THE COURT: Now, I hope I've made that clear. If there is any question about that, I think we've discussed that multiple times. It just seems to me that it would be inequitable to require him to simply accept an audited statement when that audited statement was prepared after

the time that he had been terminated from the corporation and can be influenced by discretionary decisions made by the board or remaining officers. All right. Thank you.

All right. The record we're reconvened outside the presence of the jury. There has been a request for another matter of law to be dealt with.

MR. LOVE: Just a quick question, your Honor. How do you want to proceed in closing argument because there are counterclaims. Do you want to go my opening, Bob's opening, my rebuttal, Bob gets a rebuttal for counterclaims or do you want to go no rebuttal or how do you want to proceed?

THE COURT: I want to go with three arguments. I want to go with the plaintiff's opening argument, the defendant's response, and the defendant's in affect opening argument and the plaintiff's rebuttal.

MR. LOVE: Okay.

MR. STEVENS: Your Honor, it would seem that we would be entitled to rebuttal with regard to our counterclaim.

THE COURT: I'll give you that then. Okay. So, we'll have four arguments. Just that, that, I don't want to go beyond that.

MR. LOVE: Are there any time constraints?

THE COURT: Well, I wanted to have this to the

resignation. And I believe that that is something that they have the burden to prove the validity of.

Okay. The discussions were all held timely, the reservation in relation to that jury instruction was timely and considered before it was given during the course of the trial.

We'll be in recess awaiting the deliberation of the Jury.

(Whereupon a recess was taken.)

THE BAILIFF: Third District Court will resume session. Please be seated.

THE COURT: All right, the record may show we convened in the presence of the Jury.

Mr. Robertson, were you selected as the foreperson of the jury?

MR. ROBERTSON: Yes, Your Honor.

THE COURT: Have you reached a verdict?

MR. ROBERTSON: Yes, we have, Your Honor.

THE COURT: Would you give it to the bailiff for delivery to the Court, please.

Thank you. I will read the verdict.

Do you find that Wasatch Energy breached its agreement or obligations to Roger Eggett by not paying Mr. Eggett the full amount of compensation to which he was entitled for all or part of January 1, 1997 through May 1,

1997? The answer is yes.

Two, if the answer to question number one is yes, what is the total amount of additional compensation which Wasatch Energy owes to Roger Eggett for all or part of the period of January 1 through May 1. $11,888.00.

Number 3. Do you find that Wasatch Energy breached its agreement or obligations to Roger Eggett by terminating Roger Eggett for cause and nor paying him book value for his shares of stock. Answer: Yes.

Then, skipping to question four. The shareholders agreement between the parties, on what date was the book value of Eggett's share to be determined after he resigned? June 30, 1997.

Question 5. On the date for evaluation of the shares you selected above, what was the book value of Wasatch Energy as defined by the shareholders agreement? That, the answer is $135,671.61.

And then on to the second series of questions in part 2, Wasatch Energy's claims as question number seven. The answer to that is no, thus prohibiting any further responses from the jury.

Do I understand, Mr. Robertson, that the jury's decision, as I've read this question number five, is this the value that the jury believes should be paid for the shares?

MR. ROBERTSON: We believe that to be the book value.

THE COURT: And so--

MR. ROBERTSON: Paid for the shares.

THE COURT: So from the, I think the question was confusing and that's why I wanted to ask that question. The book value would be the value from which -- yes, did you have a question?

MR. STEVENS: It seems rather inappropriate to be coming up with questions for the jury at this time. The question is as it's stated and it's answered as it's answered.

THE COURT: Well, I'm not going to allow that to stand if it is a mistake. So, if I can find that out now, I will find that out now.

What you're saying by that, let me just be sure that I understand what we're talking about. Is this the value that you think the corporation owes to Mr. Eggett to purchase his shares?

MR. ROBERTSON: Yes.

THE COURT: All right. Now I'm going to ask that question of all of you as jurors if you concur in that determination. Let me go through.

Do either of you desire that I poll the jury on any other questions?

MR. STEVENS: Your Honor, may we approach the bench?

THE COURT: You may.

(Whereupon the following sidebar was held:

MR. STEVENS: Your Honor, the way this question is worded and the way this has been argued has been entirely talked about, at least from our point of view, (inaudible) book value of the company is. We know that Mr. Eggett has 36.5%. That's the number that should be applied here. To have them now--

THE COURT: Okay, I'm not going to allow that and you can make a record of it but I'm not going to allow it. I don't believe it's consistent with their desire.

MR. STEVENS: And it's certainly not consistent with what they've just said.

THE COURT: That's exactly right and so-- we'll make a record of it and that's just fine.)

THE COURT: Okay. I'm going to poll the jury on particularly question number 5. The question, here's the problem and I want to just explain it to the jury so that I get a clear understanding of what your decision is.

We know from the facts of this case that Mr. Eggett owns 36.5 percent. If I interpret your answer to this question to be $135,000.00 for book value. That would

mean that he would be entitled to 36.5 percent of $135,000.00. If I understand it the way I have now asked you the question, he is entitled to $135,671.96 which is a number that you have come to by some calculation method for the purchase of his shares of stock. So, in other words, this figure, 135,000, is a representative smaller figure due to him which represents 36 percent of X which is a larger number. All right?

Now, I want to be sure that I understand that correctly and if any of you disagree with that, I want to know that.

First, Mrs. Hamilton, is that your verdict as I've just explained it.

MRS. HAMILTON: Yes.

THE COURT: Ms. Olson?

MRS. OLSON: Yes, your Honor.

THE COURT: Ms. Bennion?

MISS BENNION: Yes.

THE COURT: Mr. Hank?

MR. HANK: Yes.

THE COURT: Mr. Robertson?

MR. ROBERTSON: Yes.

THE COURT: Mrs. Smith?

MRS. SMITH: Yes.

THE COURT: Mr. Corpron?

MR. CORPRON: Yes.

THE COURT: Mr. Sindt?

MR. SINDT: Yes, Your Honor.

THE COURT: All right. Okay, I'm going to enter, well, we have the record and we have indicated on the record what my understanding is. This question, I find, is ambiguous in its right and the way it was written and that the jury was spoken that the value is due to Mr. Eggett is for the lost compensation, $11,888.00 and for his shares of stock, $135,671.96. That means that from this decision of the jury that those two numbers combined would equal 11, I messed up, excuse me. All right, those numbers combined would be $147,559.96. All right.

I want to thank you for your service. You can see the decisions to be made at the court and challenges of cases like this are difficult and I hope that you've learned some lessons also from the combined wisdom of sharing your views among each other and deliberating. Some of that may have been frustrating at times, but I accept our verdict. I think you've rendered a faithful service and an appropriate service. Unfortunately I have to tell you that the legislature in its wisdom has asked you to do one other thing and that is to briefly respond to some questionnaires. I will now excuse you into the jury room. This should take just a few moments.

Since you're excused from your service. There will be no further prohibition to your discussing this case and if you wish to discuss the matter with the attorneys or anyone else, you are free to do so. If you wish not to, that also will be respected. You're now excused. Thank you.

All right, do either of you have any questions or matters that you want to deal on the record before we conclude.

MR. STEVENS: I do, your Honor.

THE COURT: Yes, Mr. Stevens.

MR. STEVENS: Your Honor, this would simply (inaudible) took care but the sidebar --

THE COURT: Yes, indeed. I will indicate to you that with this system the sidebar will have been picked up on part of the record. I know we're all old practioners that don't remember sidebar conferences being recorded. But, this has been.

MR. STEVENS: Okay. I just want to make clear our objection to the questions from the bench with regard to question number five. Question number five as written, I think, was agreed to by both parties. It was answered as it was answered and it was inappropriate, I believe, for a new question to be posed to the jury without any review by either side or attorneys and created, I think, an error.

THE COURT: Okay. Well, you're entitled to have that preserved for the record and I've told you that. It seems to me that the number in and of itself causes me to conclude that it would be irrationally selected if it were other than that number. For instance, we could go through and, I don't know how they would have come up with the book value of that company at 135, if you could help me to figure that out, that would be fine, but it's entirely inconsistent with the June 30th, 1997 date.

MR. STEVENS: Well, it's also, their number on number two, was also, I don't know how they came up with that one either. I don't know they ever come up with numbers.

THE COURT: I agree with in that respect and I don't know how they came up with number two either. But, it struck me that number five could be a mathematical error by the way it was written and indeed that's what the jury confirmed it was.

So, any other questions?

Do you have any questions, Mr. Love?

MR. LOVE: No, I think, obviously, I think what you did was entirely appropriate because the jury did express some confusion and clarified its intention.

We will make a claim for attorney's fees. I just want to know how you would like us to proceed on that.

SHAREHOLDERS' AGREEMENT

This Agreement (the "Agreement") is made and entered as of the 13th day of April, 1995, by and among (a) WASATCH OIL & GAS CORPORATION, a Utah corporation (the "Corporation"), and (b) Roger K. Eggett, Jr., Todd D. Cusick, Curtis R. Chisholm (collectively, the "Shareholders," and individually, a "Shareholder").

RECITALS

WHEREAS, the Shareholders own all of the Corporation's issued and outstanding common stock (the "Shares");

WHEREAS, the Corporation and the Shareholders realize that, in the event of the death or disability of one of the Shareholders or the sale of a Shareholder's Shares during his lifetime, the Corporation's Shares might pass into the ownership or control of persons other than the remaining Shareholders, which could disrupt the harmonious and successful management and operation of the Corporation;

WHEREAS, the Corporation and the Shareholders further realize that, in the event one of the Shareholders should terminate employment with the Corporation by retirement or otherwise, such termination could disrupt the harmonious and successful management and operation of the Corporation;

WHEREAS, the Shareholders feel that their mutual interests and the interests of the Corporation mandate the imposition of certain restrictions on themselves and on the Corporation with respect to the transfer of the Shares, and

WHEREAS, the Corporation and the Shareholders have independently concluded that the method of valuing the Shares provided in this Agreement is fair and equitable

NOW, THEREFORE, in consideration of the foregoing, and the mutual promises, obligations, covenants, and agreements contained herein, as well as the mutual benefits to be derived from this Agreement, the undersigned agree as follows:

TERMS

1. Shareholders' Ownership in Corporation. The Corporation has FORTY THREE THOUSAND THREE HUNDRED AND THIRTY FOUR (43,334) shares of common stock issued and outstanding The Shares are owned as follows:

Name of Shareholder	Number of Shares
Roger K Eggett, Jr.	24,335
Todd D. Cusick	10,833
Curtis R. Chisholm	8,166

2. Purchase of Shares on Death, Disability, Retirement, or Withdrawal of an Employee Upon the death, "disability" (as defined in Paragraph 18) or "withdrawal" (as defined in Paragraph 18) (collectively, an "Event of Termination"), of an employee/shareholder of the Corporation (an "Employee") (a) the remaining Shareholders shall have the right and option, but not the obligation, exercisable at any time within ninety (90) days of any Event of Termination, to purchase, and the employee/shareholder or, in the event of such employee/shareholder's death or disability, the personal representative, executor, or legal administrator of the deceased or disabled employee/shareholder's estate (a "Legal Representative") shall, upon the exercise of such right and option by the remaining Shareholders, sell to the remaining Shareholder all or part of the stock owned by the terminated, deceased or disabled employee/shareholder (including any stock owned by such employee/shareholder's spouse, children, issue, or a trust for the exclusive benefit of such employee/shareholder, such employee/shareholder's spouse, children, or issue) at the time of any such Event of Termination, for the price and upon the terms and conditions hereinafter stipulated; provided that if any remaining Shareholder does not purchase his full proportionate allotment of the Shares, the unaccepted Shares may be purchased, proportionately, by the other remaining Shareholders within thirty (30) days thereafter.

In the event that all or part of the stock owned by an Employee (including any stock owned by the Employee's spouse, children, issue, or a trust for the exclusive benefit of the Employee, the Employee's spouse, children, or issue) is not purchased in accordance with the preceding paragraphs (a) the Corporation shall have the right and option, but not the obligation, exercisable at any time within 120 days of any Event of Termination, to purchase and redeem, and (b) the Employee (in the event of withdrawal) or the Legal Representative, as the case may be, shall, upon the exercise of such right and option by the Corporation, sell to the Corporation, all or a part of the stock owned by the Employee (including any stock owned by the Employee's spouse, children, issue or a trust for the exclusive benefit of the Employee, the Employee's spouse, children, or issue) at the time of any such Event of Termination, for the price and upon the terms and conditions hereinafter stipulated.

3 Purchase Price. If the Corporation chooses to exercise the right and option to purchase Shares following an Event of Termination, or in the event of a purchase of Shares as otherwise specified in this Agreement, the purchase price to be paid for a Shareholder's Shares shall be the value of the Shares at the time of the Event of Termination or other purchase, determined as set forth in this Paragraph Except in the case of an Employee's "termination for cause" (as defined in Paragraph 18), the purchase price shall be the "Book Value" (as defined in Paragraph 18) of such stock. In the case of an Employee's "termination for cause" (as defined in Paragraph 18), the purchase price shall be the lesser of the price paid by any such Employee for such Employee's stock or the "Book Value" (as defined in Paragraph 18) of such stock. Notwithstanding the preceding two sentences, a lesser or greater purchase

price for the common stock of the Corporation may be agreed to and specified in writing, so long as the Corporation and each of the Shareholders consents thereto in writing.

4. Method of Payment. The purchase price to be paid for any Shares purchased in accordance with the terms and conditions of this Agreement shall be paid as follows:

(a) Upon the exercise of the right to purchase Shares in accordance with this Agreement by the Corporation, then, within 180 days following the Event of Termination, and upon the qualification of a Legal Representative of the deceased or disabled Employee's estate, the Employee or the Legal Representative, as the case may be, shall be paid the greater of (i) the proceeds of any insurance policy owned by the Corporation covering the deceased Employee's life, as provided in Paragraph 11, below (limited, however, to the amount of the purchase price determined under the provisions of subparagraph 3(a), above), or (ii) twenty percent (20%), or more, of the purchase price of the Shares at the price determined as provided in Paragraph 3, above.

(b) Should the amount paid under the provisions of paragraph 4(a), above, be less than the full purchase price to be paid for the Shares, then concurrently with the payment of such amount, the Corporation or Shareholder(s), as the case may be, shall execute and deliver to the Shareholder or the Legal Representative, as the case may be, a Promissory Note which shall aggregate the total unpaid balance of the purchase price owing for the Shares, which Promissory Note shall be payable over three (3) years in equal monthly installments commencing immediately following the execution of the Promissory Note. The Promissory Note shall bear interest at the rate equal to the prime rate of interest charged by ZIONS FIRST NATIONAL BANK, Salt Lake City, Utah, to its most credit-worthy customer, as of the date of the Event of Termination, and each payment made shall be applied first to the payment of interest and then to the reduction of principal of the Promissory Note. The Promissory Note shall provide that in the event of default in payment of interest or of principal, all future installments shall become due and payable immediately. Further, in the event of default under the Promissory Note, interest shall be assessed at a default rate of eighteen percent (18%) per annum and, if collection is necessary, the costs of collection, including reasonable attorneys' fees, shall be assessable. The Promissory Note shall be subject to prepayment, in whole or in part, at any time, and shall be assignable by the holder thereof. Notwithstanding the foregoing, in no event shall the aggregate amount of the semi-annual payments on the Promissory Note during any fiscal year of the Corporation, including principal and interest, exceed twenty percent (20%) of the Corporation's net pre-tax profits for the preceding fiscal year. If payments must be reduced as a result of the preceding sentence, then the amounts that are not paid when originally due shall be paid in the next succeeding fiscal year in equal monthly installments, again subject to the twenty percent (20%) of net profits limitation.

(c) Upon receipt of the purchase price to be paid pursuant to subparagraphs 4(a) and 4(b), above, in cash, or in cash and by the Promissory Note, as provided above, in payment of the Shares, the Employee or the Legal Representative, as the case may be, shall execute and deliver to the Corporation such instruments as are necessary and proper to transfer full and complete title to the Shares to the Corporation; provided that the Corporation shall immediately assign to the Employee or the Legal Representative, as the case may be, as collateral security for the payment of the unpaid balance of any Promissory Note so issued, such number of Shares as shall equal in value, as determined by this Agreement, the amount of the unpaid Promissory Note. The Share security shall then be released proportionately as the Promissory Note is paid.

(d) Upon the exercise of the right to purchase Shares in accordance with this Agreement by a Shareholder, then, within 180 days following an Event of Termination, the purchase price shall be determined under Paragraph 3, above, and the Shareholder(s) in their discretion, shall pay the entire purchase price of the Shares in full or pay ten percent (10%), or more, of the purchase price of

the Shares and, concurrently therewith, execute and deliver to the Shareholder or the Legal Representative, as the case may be, a Promissory Note, which shall aggregate the total unpaid balance of the purchase price owing for the Shares, on substantially the terms and conditions set forth in subparagraph 4(b), above and subject to the terms and conditions set forth in subparagraph 4(c), above, as revised and interpreted to benefit the purchasing Shareholder(s).

5. Sales of Shares During Lifetime; Right of Co-Sale. Each of the Shareholders agrees that, during his lifetime, he will not transfer, encumber or dispose of any portion or all of his Shares, except in accordance with and strictly conditioned upon fulfillment of the terms and conditions of this Agreement. In the event a Shareholder receives a bona fide offer for the sale of his Shares, and desires to sell the same, he shall first give notice in writing to the other Shareholders and the Corporation setting forth the price offered and the terms and conditions of payment. The other Shareholders shall then have a period of thirty (30) days within which to purchase all or part of said Shares at the same price and on the same terms and conditions. Any Shares not purchased within the above period by the other Shareholders shall be offered to the Corporation, at the same price and terms, and the Corporation shall have the right within thirty (30) days thereafter to purchase and redeem all or part of the Shares. Any Shares not purchased within the above period by the Corporation shall be offered to the other Shareholders, at the same price and terms, and the other Shareholders shall have the right within thirty (30) days thereafter to purchase all or part of the Shares. If there is more than one other Shareholder, then each Shareholder shall have the right to purchase such portion of the Shares offered for sale as the number of Shares owned by him at such time shall bear to the total number of Shares owned by all other Shareholders; provided that if any Shareholder does not purchase his full proportionate allotment of the Shares, the unpurchased Shares may be purchased by, if there is more than one other Shareholder, the other Shareholders proportionately.

If all of the offered Shares are not purchased before the expiration of the periods specified in the preceding Paragraph, the offering Shareholder may dispose of any remaining offered Shares in any lawful manner, except that he shall not sell any such Shares to any other person for any price or upon any terms other than previously offered without first giving the Corporation and the other Shareholders the right to purchase the Shares at the price and on the terms offered by such other person, and any person acquiring such Shares must agree to enter into a Stock Redemption/Buy-Sell Agreement containing provisions similar to those set forth herein with the Corporation and the persons who then own the remainder of the Corporation's outstanding Shares.

A sale by a Shareholder under this Paragraph shall not prejudice his right to continue to participate in the operations of the Corporation. Further, a Shareholder shall not have any vested right to continue to participate in the operations of the Corporation, such matter being exclusively within the control of the Board of Directors of the Corporation.

Notwithstanding any term or condition of this Paragraph 5, whenever any Shareholder proposes to sell any shares of stock of the Corporation, such Shareholder (the "Proposed Transferor") shall provide written notice specifying the terms and conditions of the proposed sale to the other Shareholders in the manner specified in this Paragraph 5. If the Corporation or the other Shareholders, as the case may be, decline to purchase the Shares from the Proposed Transferor pursuant to this Paragraph 5, then, in lieu of such right and option, any or all of the Shareholders shall have the option to participate in such sale with the Proposed Transferor in the manner hereinafter set forth. To exercise the option, the Shareholders shall give written notice of election to the Proposed Transferor within twenty (20) days after the expiration of the thirty (30) day notice period provided. Thereupon, each of the Shareholders shall have the right, but not the obligation, to sell his Shares in the Corporation to the proposed purchaser upon the same terms and conditions specified in the Proposed Transferor's notice, pro rata with the Proposed Transferor, on the basis of their respective holdings of stock of the

Corporation. The number of Shares to be sold by the Proposed Transferor shall be reduced by the number of Shares the Shareholders elect to so sell calculated in accordance with the formula set forth in the preceding sentence unless the proposed purchaser is willing to purchase all of the Shares proposed to be sold by the Shareholders. If the Shareholders exercise such option, the Shareholders shall bear a pro rata portion of the expenses incident to such sale. Failure by a Shareholder to exercise the option within the twenty (20) day period shall be deemed a declination of any right to participate in such sale provided that such sale is completed within ninety (90) days of the expiration of such twenty (20) day period at a price and on terms and conditions set forth in the Proposed Transferor's notice. Failure to meet the foregoing conditions shall require a new notice and right of co-sale with respect to such sale.

6. Shareholder Bankruptcy, etc. If (a) any Shareholder shall make an assignment for the benefit of creditors, (b) a trustee or receiver shall be appointed for any of the assets or properties of any Shareholder, (c) any Shareholder shall file a voluntary petition in bankruptcy or shall consent to the filing of an involuntary petition in bankruptcy against him, or shall fail to obtain dismissal of bankruptcy proceedings against him within sixty (60) days following the commencement thereof, or shall be the subject of an order for relief, or (d) an attachment or execution shall be levied upon, or a tax or other statutory or judicial lien shall be placed upon, any of the Shares now or at any time hereafter held by any Shareholder and shall not be released within ten (10) days thereafter, (collectively, an "Event of Bankruptcy"), then such Shareholder (the "Bankrupt Shareholder") shall give written notice to the Corporation and all other Shareholders on or within three (3) days of the day of the happening of the Event of Bankruptcy, which notice shall describe the Event of Bankruptcy.

Upon receipt of the notice referred to in the preceding Paragraph, the Corporation shall have the option for a period of thirty (30) days to purchase any or all of the Shares owned by the Bankrupt Shareholder; provided that, if the other Shareholders do not purchase all of the Bankrupt Shareholder's Shares, the Corporation shall have the right, within an additional ten (10) day period, to purchase any part or all of the Bankrupt Shareholder's Shares unpurchased; provided further that, if the Corporation does not purchase any part or all of the Bankrupt Shareholder's Shares, the non-bankrupt Shareholder shall have the right, within an additional ten (10) day period, to purchase the unpurchased Shares, and provided further that, if there is more than one other Shareholder, each Shareholder shall have the right to purchase that portion of the unpurchased Shares as the number of Shares owned by him at the date of the Event of Bankruptcy shall bear to the total number of Shares owned by all non-bankrupt Shareholders at that date. If any non-bankrupt Shareholder does not purchase his full proportionate share of the Shares, such unpurchased Shares may be purchased by the non-bankrupt Shareholders proportionately within an additional ten (10) day period. If any of the unpurchased Shares remain unpurchased by the non-bankrupt Shareholders, any non-bankrupt Shareholder shall have an additional ten (10) day period within which to purchase such Shares. The price and terms of the purchase and sale shall be as set forth in Paragraph 3, above.

Any Shares, which become subject to the provisions of this Paragraph and as to which a purchase option is not exercised, may be transferred pursuant to such assignment for the benefit of creditors or such trusteeship, receivership, or bankruptcy proceedings, or upon sale or foreclosure under such attachment or levy of execution or lien, upon the expiration of the purchase option; provided that the transferee and such transferee's spouse, if applicable, execute and become parties to this Agreement, and thereby agree to receive and hold said Shares subject to all of the terms and conditions of this Agreement.

7. Transfers Between Shareholder and Permitted Transferee. Notwithstanding any of the terms or conditions of this Agreement, each Shareholder shall have the right during his or her lifetime to transfer all or any part of the Shareholder's Shares, with or without consideration, to a "Permitted Transferee" (as defined in Paragraph 18, below), and the shares may be transferred from any

such Permitted Transferee back to the Shareholder, provided that any Shares transferred to the Shareholder's Permitted Transferee shall remain subject to all of the terms and conditions of this Agreement, just as though said transfer had not taken place; and provided further that, at the discretion and direction of the Corporation, any Permitted Transferee executes a copy of this Agreement. In this connection, the Shareholder shall have his spouse, determined as of the date of this Agreement or any subsequent date, execute the "Consent of Spouses" attached hereto as Exhibit "A" and incorporated herein by this reference.

8. Endorsement of Certificates. The Shareholders agree that all Share certificates which they now hold or which they may acquire in the future evidencing stock of the Corporation shall be endorsed substantially as follows:

> THIS STOCK CERTIFICATE IS SUBJECT TO A SHAREHOLDERS' AGREEMENT, DATED AS OF THE _DAY OF _____, __ EXECUTED BY THE CORPORATION AND ALL OF ITS SHAREHOLDERS AND IS TRANSFERABLE ONLY IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF SAID AGREEMENT

9. Alteration or Amendments This Agreement may be altered or amended, in whole or in part, at any time by filing with this Agreement a written instrument setting forth such changes, dated and signed by the Corporation and all of the Shareholders.

10. Termination. This Agreement shall terminate upon the earliest to occur of any one of the following events:

(a) The written agreement of the Corporation and all of the Shareholders to that effect.

(b) The bankruptcy, receivership or dissolution of the Corporation.

(c) The cessation of business of the Corporation.

(d) A public offering of the capital stock of the Corporation.

(e) Whenever there is only one surviving party to this Agreement bound by the terms of this Agreement.

(f) If not sooner terminated, four (4) years after the execution of this Agreement.

11. Insurance Proceeds. The Corporation shall have the right, but no obligation, to take out insurance (whole life or term or any combination thereof) on the life of any Shareholder and a disability insurance policy covering any Shareholder. In the event the Corporation takes out any such insurance, the Corporation shall have the right to increase, terminate, or reduce such insurance whenever, at the sole discretion of the Corporation, such insurance or additional or less insurance is required to assist the Corporation in meeting its options or obligations under this Agreement; provided that, before the Corporation shall surrender any insurance policy to the insurance company which issued the same, the Corporation shall first offer such policy to the insured for the same amount(s) which the Corporation would be entitled to receive from the insurance company for the surrender of the

insurance policy. This right to purchase insurance shall lapse if not exercised within sixty (60) days following the sale of a Shareholder's Shares during his lifetime, the receipt of a statement of Shareholder disability, the termination of an Employee's employment by the Corporation, or the termination of this Agreement.

The Corporation shall be the beneficiary of the policies issued to the Corporation and may apply to the payment of premiums any dividends declared and paid on the policies. If the Corporation shall receive proceeds from any insurance policy covering the life of a deceased Shareholder or a disabled Shareholder, such proceeds shall be paid by the Corporation to the Legal Representative of the decedent's estate to the extent of the purchase price of the decedent's or disabled Shareholder's Shares. Such payment shall be deemed to have been made as payment or partial payment of the purchase price as provided hereinabove. Any amount in excess of said purchase price shall be retained by the Corporation. Payment of the insurance proceeds may be deferred until the expiration of ninety (90) days following the deceased Shareholder's death or the disability of a Shareholder. In the event the proceeds from such insurance policy or policies are insufficient to pay the purchase price for the Shares, as set forth above, then the deficiency shall be paid in accordance with subparagraph 4(b), above.

12. Notices Any and all notices, designations, offers, acceptances, or any other communications provided for in this Agreement shall be given, in writing, by registered or certified mail, which shall be addressed, in the case of the Corporation, to its principal office, and in the case of the Shareholders, to their addresses appearing on the stock books of the Corporation.

13. Invalid Provision; Severability. The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof and the Agreement shall be construed in all respects as if such invalid provision were omitted.

14. Legal Effect, Future Share Issuances The provisions of this Agreement shall be deemed covenants running with the ownership of the Shares of the Corporation presently owned by the Shareholders and all future issuances of stock by the Corporation, and shall be binding upon and inure to the benefit of the parties hereto, and also upon their heirs, executors, legal administrators, successors or assigns; and the parties hereby agree for themselves and their heirs, executors, administrators, successors or assigns, to execute any instruments and to perform any act which may be necessary or proper to carry out the purposes of this Agreement.

15. Involuntary Transfers, Void Transfers In the event that any portion of the Shares of any Shareholder of the Corporation, or any interest therein, shall be acquired by any third person, firm or corporation as a result of execution, attachment or judicial sale, by operation of law or in any manner other than a voluntary transfer by said Shareholder, the Shares so acquired by said third person, firm or corporation shall remain subject to the terms and conditions of this Agreement and to the rights of the Corporation and the other Shareholders of the Corporation hereunder, and the person, firm or corporation so acquiring said Shares shall be required, as a condition precedent to transfer of said Shares to enter in an Agreement containing provisions similar to those set forth herein with the Corporation and the persons who then own the remainder of the Corporation's outstanding Shares. Otherwise, any transfer or attempt to transfer any Shares in violation of the terms of this Agreement shall not be valid. The transferee shall not be deemed to be the shareholder of such Shares, or entitled to any rights thereon, and the Corporation shall refuse to transfer any Shares on its books to the alleged transferee thereof.

16. Injunctive Relief. The parties hereby declare that it is impossible to measure in money the damages which will accrue to a party or person bound hereby or to the Legal Representative

of a deceased or disabled party or person by reason of a failure to perform any of the obligations under this Agreement. Therefore, if any party hereto or the Legal Representative of a deceased or disabled Shareholder or a Permitted Transferee shall institute any action or proceeding to enforce the provisions hereof, any person (including the party against whom such an action or proceeding is brought) hereby agrees that the court in such an action is brought may grant injunctive relief and hereby waives the claim or defense therein that such party, Legal Representative, or Permitted Transferee has an adequate remedy at law, and such person shall not urge in any such action or proceeding the claim or defense that such a remedy at law exists. Any sale, transfer, or other disposition made in violation of this Agreement shall be null and void and of no force or effect.

17. Provision in Will. This Agreement shall be binding upon the parties to this Agreement, their heirs, legatees, executors, administrators and assigns. To this end, each party to this Agreement shall maintain in effect at all times a will directing his or her representative to carry out the terms and conditions of this Agreement and to execute any and all documents necessary to accomplish that result, provided that the failure to maintain in effect such a will shall not affect the rights or obligations of the parties to this Agreement.

18. Definitions. As used in this Agreement, the following terms shall have the meanings set forth below.

(a) Disability. For purposes of this Agreement, if at any time in the opinion of the Corporation a question arises as to the disability of any Shareholder, then the Corporation shall promptly employ three (3) physicians who are members of the American Medical Association to examine the Shareholder and determine if his physical and mental condition is such as to render him incapable of participating in the operations of the Corporation. In the event the Shareholder under consideration appears to have mental capacity to act in his own behalf, then one (1) of the three (3) physicians employed by the Corporation for this purpose shall be a physician selected by the Shareholder. The decision of said group of three (3) physicians shall be certified in writing to the Board of Directors of the Corporation and the Board of Directors may make such certification available to the Shareholder or his Legal Representative. The Board of Directors of the Corporation, in its sole discretion, shall make any final determination of permanent disability and said determination of permanent disability shall be binding and conclusive upon the Corporation and the involved Shareholder and shall have the effect of terminating the participation of the Shareholder in the operations of the Corporation for purposes of this Agreement.

(b) Permitted Transferee. For purposes of this Agreement, (i) a transfer by a Shareholder of any of his Shares in the Corporation (A) to his spouse or issue of either of them or his parents, or (B) in trust for the benefit of himself, his spouse, or issue of either spouse, provided that the Shareholder has and at all times maintains legal and practical control of any such trust, (C) to a family partnership in which the Shareholder has and at all times maintains legal and practical control of the affairs of the family partnership and in which the only partners are the Shareholder, his spouse, or the issue of either of them or (D) to Shareholders other shall be deemed a transfer of Shares to a "Permitted Transferee", and such spouse, or the issue of either spouse, shall be deemed to be a Permitted Transferee with respect to such Shares, (ii) a person shall be deemed a Permitted Transferee of a Shareholder only with respect to the Shares received from such Shareholder or from other Permitted Transferees of such Shareholder, and (iii) a Permitted Transferee shall be deemed a Permitted Transferee of the Shareholder from whom he received such Shares, or if the Shares were received from another Permitted Transferee, the Shareholder from whom such Permitted Transferee received the Shares.

(c) Withdrawal, Termination for Cause. Any withdrawal by an Employee from participation in the operations of the Corporation as a result of the mutual or unilateral decision of

the Employee and the Corporation or the Employee, respectively, other than by reason of disability or "termination for cause" (as defined below) For purposes of this Agreement, "termination for cause" shall mean termination of an Employee's employment by and with the Corporation, upon fifteen (15) days written notice from the Corporation, for "cause" as follows:

(i) if the Employee has been convicted of, or pleads guilty or nolo contendere to, a felony or a crime involving moral turpitude, in which case the Corporation may terminate such Employee's employment immediately upon the occurrence of such conviction or plea; or

(ii) if the Employee has (A) engaged in fraudulent misconduct with respect to the Corporation, or (B) engaged in theft of Corporation assets, or

(iii) if the Employee has committed any material breach of his obligations, covenants, agreements, or warranties to the Corporation; or

(iv) in the event of the repeated neglect, malfeasance, nonfeasance, or other conduct of the Employee in the performance of the services of the Employee to the Corporation, any of which (in the reasonable judgment of the Board of Directors of the Corporation) is detrimental to the best interests of the Corporation; or

(v) if the Employee has a substance abuse problem.

(d) Book Value. For purposes of this Agreement, "Book Value" shall mean the consolidated net shareholders' equity of the Corporation determined as of the end of each of the Corporation's calendar years (commencing December 31, 1994) as certified to by the firm of independent public accountants then regularly employed by the Corporation, divided by the number of the Shares issued and outstanding Such determination shall be made on an accrual basis in accordance with generally accepted accounting principles and shall be binding and conclusive upon the parties to this Agreement and their Permitted Transferees. Proceeds of any insurance owned by the Corporation on the life of a deceased Shareholder shall not be included in any calculation of "Book Value" (as defined below) for purposes of arriving at the value of the Shares owned by the deceased Shareholder, his estate, heirs, or Permitted Transferee(s). The "Book Value" (as defined below) as of December 31 of each year (commencing December 31, 1993) shall be based on audited financial statements However, because of the time required to prepare audited financial statements as of December 31 of each year, any valuation of Shares that is to be made after December 31 of a year but before completion of audited financial statements (and the price to be paid) shall be based upon an estimate of "Book Value" (as defined below) as of the appropriate December 31. Such estimate of "Book Value" (as defined below) and purchase price shall be adjusted following receipt of the audited financial statements so as to conform with the audited financial statements.

(e) Shareholders' Equity For purposes of this Agreement, "Shareholders' Equity" shall mean the shareholders' equity of the Corporation as certified to by the firm of certified public accountants then regularly employed by the Corporation in the Corporation's most recent consolidated financial statements. Such determination shall be binding and conclusive upon the parties to the Agreement and their Permitted Transferees.

19. General Provisions. The parties hereto hereby agree to the following general provisions:

(a) The administrator, personal representative or Legal Representative of a deceased or disabled Shareholder shall execute and deliver any and all documents or legal instruments necessary or desirable to carry out the provisions of this Agreement.

(b) This Agreement shall be governed by the laws of the State of Utah, notwithstanding the fact that one of the parties to this Agreement may hereafter become a resident of a different State.

(c) In the event any legal action is required by a party to this Agreement to enforce the provisions of same, the prevailing party shall be entitled to recover its costs of suit, including reasonable attorneys' fees.

(d) The rights and obligations of any Shareholder, Permitted Transferee, or the heirs or estate of either of them under this Agreement may not be assigned without the prior written consent of the Corporation.

(e) Future Shareholders of the Corporation may become parties to this Agreement by executing a counterpart hereof and, if and when applicable, by having their spouse execute a counterpart of the Consent of Spouses attached hereto, whereupon each such signing person shall be bound by the terms and conditions of this Agreement and shall be entitled to the rights under this Agreement thereafter, as though such person had originally executed this Agreement.

(f) It is expressly understood that this Agreement constitutes the entire agreement between the parties hereto and that there are no representations, warranties, or agreements, whether express or implied or oral or written, except as set forth herein. The terms and conditions of this Agreement may be modified only by a written agreement signed by all the parties hereto.

(g) No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

(h) Unless the context otherwise requires, the singular includes the plural, the plural includes the singular, and any masculine or feminine references include the other.

20. Termination by Establishment of Public Market for Shares; Termination by Shareholder Agreement. This Agreement shall automatically terminate and all restrictions upon the sale, disposition or transfer of the Shares established by this Agreement shall be removed at such time as the Corporation shall, with approval of the Shareholders who own or whose Permitted Transferees own two-thirds (2/3) of all of the Shares, through voluntary registration or other voluntary action establish a public market for the Shares. This Agreement may be terminated by the affirmative vote of Shareholders who own or whose Permitted Transferees own two-thirds (2/3) of all of the Shares.

(a) In the event that this Agreement is so terminated, any Shareholder who voted against termination and his Permitted Transferee(s), may, within ninety (90) days from such termination, offer all, but not some, of their aggregate Shares to the Corporation for purchase upon the terms and conditions set forth in Paragraphs 3 and 4, above, and the Corporation shall purchase such

Shares as therein provided. If the Corporation has insufficient "Shareholders' Equity" (as defined below) to purchase all of the Shares which are offered to the Corporation by such Shareholders and Permitted Transferees, then the Corporation shall purchase such Shares to the extent that it shall have qualified "Shareholders' Equity" (as defined below), such "Shareholders' Equity" (as defined below) to be used (proportionately, if inadequate to purchase all such Shares) among all of such Shareholders and Permitted Transferees who offer Shares pursuant to this subparagraph.

(b) Should the Corporation fail to purchase the Shares of any such Shareholder or Permitted Transferee or any part thereof, as in Paragraph 20(a), above, then such Shareholder or Permitted Transferee may sell those Shares not purchased by the Corporation in accordance with the procedure contained in Paragraph 5, above except that no offer need be made to the Corporation as called for in subparagraph 20(a), above, and the only parties having a right to purchase such Shares shall be the other eligible Shareholders.

(c) A sale by a Shareholder under this Paragraph shall not prejudice his right to continue to be an employee of the Corporation. Neither shall such a Shareholder have any vested right to continue to be an employee of the Corporation, such matter being exclusively the responsibility of management of the Corporation.

(d) It is understood that the rights conferred by this Paragraph are optional to said Shareholders and Permitted Transferees and that they may retain their Shares in the Corporation following termination of this Agreement by agreement of the Shareholders.

21. Previous Shareholders' and Shareholder's Agreements. This Agreement supersedes, amends and replaces all previous Shareholders' and Shareholder's Agreements.

IN WITNESS WHEREOF, the Corporation has caused this Agreement to be executed by its duly authorized officers and the Shareholders have executed this Agreement, all as of the 13th day of April, 1995.

SHAREHOLDERS.

WASATCH OIL & GAS CORPORATION, a Utah corporation

By _____
Its President

BOOK VALUE

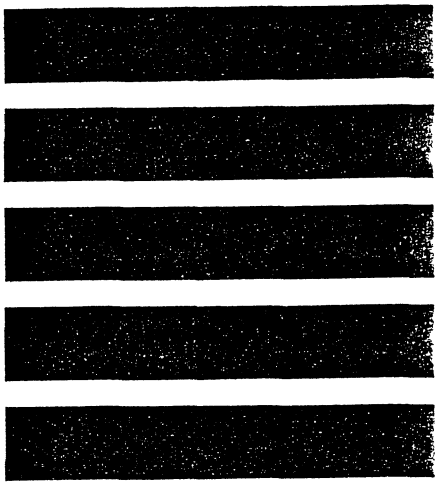
- Book Value is determined by multiplying Stockholders' Equity by Ownership interest.
- Stockholders' Equity * Ownership Interest

REVISED RETAINED EARNINGS AS OF JUNE 30, 1997

■ Per Audit Report	$57, 224
■ Add Swap Contract Adj.	$283,000
■ Add Suspense Items	$296,252
■ Add Grynberg Adj.	$45,553
■ Adjusted Retained Earnings	$682,029

CALCULATED BOOK VALUE at JUNE 30, 1997

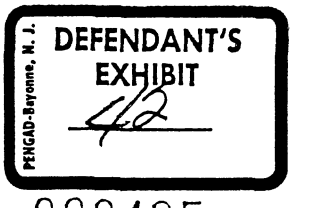
■ Adjusted Retained Earnings	$682,029
■ Contribued Capital	$17,749
■ Total Stockholders' Equity	$699,778
■ Ownership Interest	36.5%
■ Book Value	$255,419



Consolidated Financial Statements

Wasatch Energy Corporation

June 30, 1997



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ERNST & YOUNG LLP

Wasatch Energy Corporation

Consolidated Financial Statements

Years ended June 30, 1997 and 1996

Contents

ERNST & YOUNG LLP

Suite 800
60 East South Temple
Salt Lake City, Utah 84111

Phone 801 350 3300
Fax 801 350 3456

Report of Independent Auditors

The Board of Directors and Stockholders
Wasatch Energy Corporation

We have audited the accompanying consolidated balance sheets of Wasatch Energy Corporation as of June 30, 1997 and 1996, and the related consolidated statements of income, stockholders' equity and cash flows for the years then ended. These financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on these financial statements based on our audits.

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the consolidated financial statements referred to above present fairly, in all material respects, the consolidated financial position of Wasatch Energy Corporation at June 30, 1997 and 1996, and the consolidated results of its operations and its cash flows for the years then ended in conformity with generally accepted accounting principles.

Ernst + Young LLP

August 19, 1997

Wasatch Energy Corporation

Consolidated Balance Sheets

	June 30 1997	1996
Assets		
Current assets:		
Cash		$1,049,112
Accounts receivable	$2,538,576	2,072,718
Deferred income tax assets and prepaid expenses	435,579	344,678
Accounts receivable from related parties	12,000	
Total current assets	2,986,155	3,466,508
Property, plant and equipment:		
Furniture and equipment	269,845	58,107
Natural gas producing properties	50,847	63,340
Less accumulated depreciation	(93,489)	(27,929)
	227,203	93,518
	$3,213,358	$3,560,026

	June 30	
	1997	1996
Liabilities and stockholders' equity		
Current liabilities:		
Outstanding checks in excess of bank balance	$ 98,008	
Accounts payable	1,746,995	$2.899.284
Accrued liabilities	957,447	397,987
Accrued income taxes	304,299	65.489
Accrued taxes. other	31,157	73.152
Total current liabilities	3,137,906	3,435.912
Note payable to stockholder		105.942
		105.942
Stockholders' equity:		
Common stock. par value $ 05 per share: authorized 100.000 shares. 66.667 shares in 1997 and 1996 issued and outstanding	3,333	3.333
Additional paid-in capital	16,226	19.016
Retained earnings	57,703	479
	77,262	22.828
Treasury stock. at cost: 700 shares in 1997 and 1.800 shares in 1996	(1,810)	(4.656)
Total stockholders' equity	75,452	18.172
Total liabilities and stockholders' equity	$3,213,358	$3.560.026

Book Value

See accompanying notes.

Wasatch Energy Corporation

Consolidated Statements of Income

	Year ended June 30	
	1997	**1996**
Sales	**$29,924,165**	$12,016,135
Interest income	**38,337**	11,866
	29,962,502	12,028,001
Cost of sales	**27,437,624**	11,254,817
General and administrative	**2,358,032**	568,469
	29,795,656	11,823,286
Income before interest expense and income taxes	**166,846**	204,715
Interest expense	**80,688**	16,517
Income before income taxes	**86,158**	188,198
Income taxes	**28,934**	68,359
Net income	**$ 57,224**	$ 119,839

See accompanying notes

Wasatch Energy Corporation

Consolidated Statements of Stockholders' Equity

	Common Stock	Additional Paid-In Capital	Retained Earnings (Deficit)	Treasury Stock	Total
Balance at July 1, 1995	$3,333	$ 29,667	$(119,360)	$(15,517)	$(101,877)
Issuance of treasury stock		(10,651)		10,861	210
Net income			119,839		119,839
Balance at June 30, 1996	3,333	19,016	479	(4,656)	18,172
Issuance of treasury stock		(2,790)		2,846	56
Net income			57,224		57,224
Balance at June 30, 1997	$3,333	$ 16,226	$ 57,703	$ (1,810)	$ 75,452

See accompanying notes

Wasatch Energy Corporation

Consolidated Statements of Cash Flows

	Year ended June 30 1997	1996
Operating activities		
Net income	**$ 57,224**	$ 119,839
Adjustments to reconcile net income to net cash provided by (used in) operating activities:		
Depreciation and amortization	**70,218**	53,164
Changes in operating assets and liabilities:		
Accounts receivable	**(465,858)**	(1,736,229)
Prepaids and other assets	**(102,901)**	(229,092)
Accounts payable	**(1,152,289)**	2,482,746
Accrued liabilities	**559,460**	284,551
Accrued income and other taxes	**196,815**	135,693
Net cash provided by (used in) operating activities	**(837,331)**	1,110,672
Investing activities		
Purchases of property, plant and equipment	**(203,903)**	(69,044)
Financing activities		
Additional paid in capital	**(2,790)**	
Note payable	**(105,942)**	(43,358)
Issuance of treasury stock	**2,846**	210
Net cash used in financing activities	**(105,886)**	(43,148)
Net increase (decrease) in cash	**(1,147,120)**	998,480
Cash at beginning of year	**1,049,112**	50,632
Cash (checks outstanding in excess of bank balance) at end of year	**$ (98,008)**	$ 1,049,112

See accompanying notes.

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Wasatch Energy Corporation

Notes to Consolidated Financial Statements

June 30, 1997

1. Significant Accounting Policies

Wasatch Energy Corporation (the Company) was incorporated July 7, 1993, under the laws of the state of Utah as Wasatch Oil & Gas Corporation. On April 10, 1996, the Company changed its name to Wasatch Energy Corporation and formed Wasatch Oil & Gas Corporation as a wholly-owned subsidiary. The Company principally buys and resells natural gas to retail markets.

Principles of Consolidation

The consolidated financial statements include the accounts of Wasatch Energy Corporation and its wholly-owned subsidiary Wasatch Oil & Gas Corporation. All significant intercompany accounts and transactions have been eliminated.

Property, Plant and Equipment

Property, plant and equipment, including natural gas producing properties, are recorded at cost. Depreciation is computed using the straight-line method based on estimated useful lives of 36 months.

Gas Imbalances

Quantities of gas over-delivered or under-delivered under imbalance agreements with pipelines, are recorded monthly as prepaids or accrued liabilities using the lower of cost or market price for prepaid balances and higher of cost or market price for accrued liability balances. Generally, these balances are settled with deliveries of gas.

Revenue Recognition

The Company recognizes gas sales when the purchaser takes possession of gas at the contracted point of delivery.

Wasatch Energy Corporation

Notes to Consolidated Financial Statements (continued)

1. Significant Accounting Policies (continued)

Credit Risk

The Company's primary market areas are the Rocky Mountain and Pacific Northwest regions. The Company's exposure to credit risk may be impacted by the concentration of customers in those regions due to changing economic or other conditions. The Company's customers include individuals and companies in numerous industries that may be impacted differently by changing conditions. The Company believes that it does not have significant potential for credit related losses and that the carrying amount of receivables equals fair value. The Company generally does not require collateral from customers.

Market Risk

The Company enters into swaps and options to secure known margins for the marketing of natural gas. Generally, swap contracts involve exchanging a NYMEX based price or fixed price for a local market price. There is a high degree of correlation of such contracts with the related physical commodity. Recognized gains and losses on the hedged transactions are recorded during the same period as the related physical transactions. Failure by counter parties to deliver physical volumes may expose the Company to market risk.

Use of Estimates

The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the amounts of assets and liabilities or the results of operations. Actual amounts could differ from those estimates.

Income Taxes

Temporary differences primarily relate to unrealized losses and certain reserves not currently deductible for tax purposes.

Reclassifications

Certain 1996 amounts have been reclassified to conform with the 1997 presentation.

Wasatch Energy Corporation

Notes to Consolidated Financial Statements (continued)

2. Financial Instruments

At June 30, 1997 and 1996, the Company held swap contracts covering approximately 3,800,000 MMBtus and 7,000,000 MMBtus of natural gas to be delivered through October 1998 and December 1997, respectively. The face value of the contracts was approximately $5,500,000 and $9,800,000 at June 30, 1997 and 1996, respectively. The market value of the contracts was approximately $627,000 less and $610,000 less than face value at June 30, 1997 and 1996, respectively. As of August 19, 1997, the market value was approximately $255,000 less than face value. The calculation of the market value assumes the Company closed its position on that date and did not recognize potential gains on the physical transaction. The fair value of these contracts was based on market prices as listed in Inside FERC or quotations from brokers at year end. The Company only enters into swap contracts with large credit worthy brokers specializing in natural gas derivatives.

3. Income Taxes

Deferred income taxes reflect the net tax effects of temporary differences between the carrying amounts of assets and liabilities for financial reporting purposes and the amounts used for income tax purposes. The Company's deferred tax assets are approximately $374,000 and $0 at June 30, 1997 and 1996, respectively.

The components of deferred taxes are primarily certain reserves and unrealized losses not currently deductible for tax purposes.

The provision for income taxes consists of the following:

	June 30	
	1997	**1996**
Federal:		
Current	**$ 349,000**	$59,000
Deferred	**(325,000)**	
Total Federal	**24,000**	59,000
State:		
Current	**54,000**	10,000
Deferred	**(49,000)**	
Total State	**5,000**	10,000
Total	**$ 29,000**	$69,000

Wasatch Energy Corporation

Notes to Consolidated Financial Statements (continued)

3. Income Taxes (continued)

Differences between the reported amount of income tax expense attributable to continuing operations for the year and the amount of income tax expense that would result from applying domestic federal statutory tax rates to pretax income from continuing operations relate primarily to permanent differences.

4. Related Party Transactions

At June 30, 1997, the Company holds a note receivable from a stockholder for $12,000.

The Company also leased office space on a month to month basis from a stockholder during 1997 and 1996. Total payments under the lease totaled $33,950 and $19,500 at June 30, 1997 and 1996, respectively.

5. Lease Obligations

Rental expense for 1997 and 1996 was $63,412 and $19,500, respectively. Future rental payments for a non-cancelable office building lease from June 30, 1997 through February 28, 2000 total $455,000. The Company also has the option to extend the lease for 2 years.

6. Contingencies and Commitments

Prepaid Gas Transaction

During August 1996, the Company, and an outside investor, entered into a prepaid natural gas transaction with a supplier. Based on commitments to deliver gas from the supplier, the Company entered into swap contracts with brokers to secure a margin on the scheduled deliveries. In March 1997, the supplier ceased delivery of its gas to the Company, filed suit against the Company to void the contract, and sold its gas reserves to a third party. The Company countersued for breach of contract and foreclosure on the supplier's properties.

At June 30, 1997, the Company had recorded as accounts receivable approximately $490,000 for payments made to settle the related swap contracts. The Company estimates that an additional $400,000 will be paid to settle swap positions through December 31, 1997.

Wasatch Energy Corporation

Notes to Consolidated Financial Statements (continued)

6. Contingencies and Commitments (continued)

Fixed Price Derivative Transactions

At June 30, 1997, the Company held a swap contract with a broker for which there was no offsetting physical transaction. The contract settles monthly and calls for the Company to pay a local market price for that month and in return receive $1.50 per MMBtu. Volumes covered by the contract are 3,700 per day with the contract beginning July 1, 1997 and ending on June 30, 1998. Face value of the contract is approximately $2,025,750. At June 30, 1997, the Company would incur a loss of approximately $283,000 related to this contract if it closed its position. Since inception, the maximum potential loss of the contract has been $305,000.

Other

Estimates for payments to settle swap contracts are based on current market prices of natural gas which can fluctuate significantly.

The Company has a $1,800,000 revolving line of credit with a bank. As of June 30, 1997, $250,000 of the $1,800,000 was reserved for an outstanding letter of credit.

Perrin R. Love (5505)
CLYDE SNOW SESSIONS & SWENSON
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111
(801)322-2516

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY STATE OF UTAH

ROGER K. EGGETT, JR., an individual, Plaintiff, vs. WASATCH ENERGY CORPORATION, a Utah Corporation, Defendants.	AFFIDAVIT OF PERRIN R. LOVE IN SUPPORT OF AWARD OF COSTS, EXPENSES, AND ATTORNEY'S FEES Civil No. 97-0906444CV Judge David S. Young

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Perrin R. Love, being first duly sworn, on his oath deposes and verily states:

a. I have been a shareholder of Clyde, Snow, Sessions & Swenson since September 1998 ("Clyde, Snow"). Before that, I was a shareholder at Campbell, Maack & Sessions ("CMS"). I have served as counsel for Roger Eggett ("Mr. Eggett") in the above-captioned litigation.

b. I submit this Affidavit in Support of Award of Costs, Expenses, and Attorney's Fees of Reasonable Attorney Fees pursuant to the finding of the Court that Mr. Eggett is the prevailing

party. All statements are based upon my personal knowledge and my review of the billing records of Clyde, Snow and CMS.

3. At trial, the jury awarded to Mr. Eggett $11,888.35 in additional compensation due Mr. Eggett as damages for breach of his Employment Agreement ("Employment Agreement") dated April 21, 1995, and the covenant of good faith and fair dealing. The jury awarded to Mr. Eggett $135,671.60, the book value of Mr. Eggett's shares in defendant Wasatch Energy Corp. ("Wasatch"), as damages for breach of the Shareholder's Agreement ("Shareholder's Agreement") dated April 13, 1995 and the covenant of good faith and fair dealing. In so awarding, the jury rejected Wasatch's defenses and counterclaims that Mr. Eggett was properly terminated for cause or that Eggett had taken excessive compensation and abused his expense account.

4. Mr. Eggett's claim for costs, expenses, and attorney's fees is based upon paragraph 19(c) of the Shareholder's Agreement, which states in full:

> In the event any legal action is required by a party to this Agreement to enforce the provisions of same, the prevailing party shall be entitled to recover its costs of suit, including reasonable attorneys' fees.

The Employment Agreement has no comparable provision, and does not authorize either prevailing party to recover expenses or attorney's fees.

5. In making this Affidavit, I follow the four factors identified in Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988), to determine the reasonableness of attorney's fees: (1) what legal work actually was performed; (2) was the legal work reasonably necessary to adequately prosecute or defend the matter; (3) were the hourly rates reasonable compared to others in the locality; and (4) what additional circumstances, including the circumstances listed in Rule 1.5 of the Rules of Professional Conduct, affect the reasonableness of the fees. Accord, Cabrera v. Cottrell, 694 P.2d 622 (Utah 1992).

6. For the reasons explained below, Eggett is entitled to an award of cost, expenses, and attorney's fees in the amount of $56,900.27. In calculating this amount, I have excluded costs, expenses, and attorney's fees incurred before May 16, 1997, because those fees relate solely to Mr. Eggett's claims for additional compensation pursuant to the Employment Agreement, which does not authorize an award of costs, expenses, or attorney's fees.

7. I was retained by Mr. Eggett on or about April 25, 1997, about 10 days after he submitted his letter of resignation to Wasatch (to be effective July 14, 1997). Mr. Eggett agreed to pay for my representation at an hourly rate of $150.00 per hour.

8. Initially, I was retained to assist Mr. Eggett in obtaining compensation to which he was entitled pursuant to his Employment Agreement for the period January 1, 1997 through July 14, 1997. The scope of my representation changed when I received notice on May 16, 1997, that Wasatch had terminated Eggett for cause pursuant to paragraph 2(e) of the Employment Agreement. Shortly thereafter, Wasatch informed me that, because Eggett had been terminated for cause, Wasatch was entitled to redeem Eggett's shares for par value rather than book value, pursuant to paragraphs 3 and 18(e) of Shareholder Agreement.

9. Accordingly, the scope of my representation expanded on or about May 16, 1997, to include claims for breach of the Shareholder Agreement, and to obtain for Mr. Eggett book value for his shares. These claims required Mr. Eggett to prove that his termination for cause was wrongful, that he had not taken excessive compensation or abused his expense account, and that his termination was a pretext to deny him book value for his shares.

10. Because Mr. Eggett's claims under the Shareholder Agreement are inextricably intertwined with his claims under the Employment Agreement, and with Wasatch's counterclaims, Mr. Eggett is entitled to recover all of his costs, expenses, and fees incurred from the time that Mr. Eggett was terminated for cause, and that Wasatch asserted that it was entitled to pay Mr. Eggett par

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value rather than book value. This Court has discretion to award all fees where a prevailing party is entitled to an award of attorney's fees on some, but not all, claims.

11. In Hensley v. Eckerhart, 461 U.S. 424 (1983), the Supreme Court held that a prevailing party may recover fees only on the claims on which it prevailed or is otherwise entitled to an award, unless all claims involve a common core of fact or legal theory. Where the parties' claims involve a common core of facts or related legal theories, much

> of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims.

461 U.S. at 435. In those situations, where

> a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds in not a sufficient reason for reducing a fee. The result is what matters.

Id.

12. The Utah Court of Appeals adopted the same approach in Sprouse v. Jager, 806 P.2d 219 (Utah App. 1991). In Sprouse, the attorney for the prevailing party apportioned one-third of his time in litigation to a contract claim, and two-thirds of his time to other claims (the contract had an attorney's fee provision). The trial court awarded the prevailing party all of its fees, and the Court of Appeals upheld the award because all claims and issues were so intertwined:

> The trial court has discretion in determining reasonable attorney fees, and, absent an abuse of discretion, we will not overturn such an award. Although the minute entry is somewhat sketchy, it appears that Sprouse's objection is not to the number of hours or to the hourly rate, but rather it is to the fact that the court failed to separate out two-thirds of the attorney time that Sprouse considered to be irrelevant because it did not pertain to the [contract claim]. However, the court was satisfied that, because appellees prevailed on the counterclaim, the foreclosure, and the collection, they were entitled to the full amount. Because these complex issues were so intertwined, we find the court acted within its discretion in its award of attorney fees.

806 P.2d at 226 (emphasis added).

13. After May 16, 1997, my time was devoted to the litigation as a whole, and not to discreet claims under either the Shareholder Agreement or the Employment Agreement. The parties prepared for and participated in a mediation in August 1997 that addressed all of the parties' claims and counterclaims. Preparation of Mr. Eggett's pleadings obviously related to all claims, as did document discovery from Wasatch, Magna Energy International, and Ernst & Young. The depositions of Roger Eggett, Keith Painter, David Lillywhite, Curtis Chisholm, and Tod Cusick related to all claims, as did trial preparation and trial.

14. Appended to this Affidavit are the billing statements provided to Mr. Eggett from April 25, 1997, through the date of this Affidavit, by Clyde, Snow and CMS. The time entries reflected on the billing statements were recorded on a regular if not daily basis throughout this litigation, and were maintained on the CMS and Clyde, Snow computerized billing systems.

15. From April 25, 1997, through December 31, 1997, Mr. Eggett was billed at a rate of $150.00 per hour. Mr. Eggett, however, could not afford to pay this hourly rate. As of October 31, 1997, I agreed with Mr. Eggett to defer half of the hourly fee until Mr. Eggett obtained a favorable settlement or judgment, and agreed to be paid from the proceeds of that settlement or judgment. This was not a modification of the retainer agreement from an hourly to a contingency fee; Mr. Eggett agreed that if he did not obtain a favorable settlement or judgment, he would pay the deferred fee from other sources. Accordingly, the billing statements from November 1, 1997 forward reflect an hourly rate of $75.00 per hour. In making this Affidavit, I adjust those billing statements to reflect the fees to be awarded at a rate of $150.00 per hour. I believe that a rate of $150.00 is reasonable, because my hourly rate since January 1, 1998, has been $175.00.

16. To summarize the fees and expenses in the billing statements:

a. Exhibit A is a Statement of Services Rendered from April 25, 1997 through May 31, 1997. Again, Mr. Eggett seeks an award of fees and costs from May 16, 1997 forward.

Those fees total $1,320.00 (8.8 hours); the costs total $168.30 (including $150.00 for the Mediation filing fee required by the American Arbitration Association).

b. Exhibit B is a Statement of Services Rendered for June 1997. The total fees are $255.00. The total costs are $1.00.

c. Exhibit C is a Statement of Services Rendered for July 1997. The total fees are $2,250. Total costs are $.60.

d. Exhibit D is a Statement of Services Rendered from August 1, 1997 through October 31, 1997. The total fees incurred are $2,407.50, which relate to the mediation conducted pursuant to the rules of the American Arbitration Association, and the preparation of the initial pleadings. Total costs are $372.10, which relate primarily to the mediator's fee. This amount excludes $175.00 in costs reflected on the billing statement for filing the initial Complaint in Second District Court. After filing in Second District Court, I refiled the Complaint in Third District Court. Wasatch should not have to pay both filing fees.

e. Exhibit E is a Statement of Services Rendered from November 1, 1997 through December 31, 1997. The total fees are $795.00 (at $150.00 per hour), and relate to answering Wasatch's counterclaim, settlement negotiations, and preparing discovery requests. Total costs are $324.27, which include the Third District Court filing fee.

f. Exhibit F is a Statement of Services Rendered from January 1, 1998 through February 28, 1998. The total fees are $375.00 (at $150.00 per hour). Total costs are $2.83.

g. Exhibit G is a Statement of Services Rendered for April, 1998. Total costs are $10.01.

h. Exhibit H is a Statement of Services Rendered for May 1998. The total fees are $3,060 (at $150.00 per hour). These fees relate principally to the depositions of Mr. Eggett and Keith Painter, and the document production from Ernst & Young. Total costs are $46.57.

i. Exhibit I is a Statement of Services Rendered for June 1998. The total fees are $270 (at $150.00 per hour). Total costs are $5.20.

j. Exhibit J is a Statement of Services Rendered for August 1998. The total fees are $1,200.00 (at $150 per hour), and relate primarily to the depositions of Curtis Chisholm and David Lillywhite.

k Exhibit K is a Statement of Services Rendered from October 1998 through March 1999. The total fees are $360.00 (at $150.00 per hour). Total costs are $397.66.

l. Exhibit L is a Statement of Services Rendered from April 1999 through September 1999. The total fees are $2,925.00 (at $150.00 per hour). These fees relate primarily to the deposition of Tod Cusick, to preparing responses to discovery, and to preparing a motion to compel responses to discovery. Total costs are $522.60, which include the court reporter fees for the Cusick deposition.

m. Exhibit M is a Statement of Services Rendered for October 1999. The total fees are $16,513.00. These fees include my fees of $13,275.00 (at $150.00 per hour), T. Mickell Jimenez's fees of $2,622.00 (at $115.00 per hour), and Amy Pelton's fees of $616.00 (at $70.00 per hour). Ms. Jimenez is an associate who performed legal research relating to jury instructions and other issues, including the definition of "good cause" and "bad faith" in wrongful termination cases, liability of a board of directors for wrongful termination, and admissibility of after-acquired evidence as a basis for wrongful termination. Amy Pelton is a paralegal who prepared trial exhibits, and operated the projector at trial. Total costs are $590.80, which include copying costs for all copies of the trial exhibits.

n. Exhibit N is a Statement of Services Rendered for November 1999 and December 1-3. The total fees are $19,762.00 . These fees include my fees of $14,175.00 (at $150.00 per hour), T Mickell Jimenez's fees of $828.00 (at $115.00 per hour), Amy Pelton's fees of $4,256.00 (at $70.00 per hour), and Susan Bailey and Donald Maughan's fees of $203.00 (at $70

per hour). My fees relate to trial preparation (including preparation of the jury verdict form, jury instructions, and voir dire questions, as well as preparations of witness exams and opening argument), attendance at trial, and post-trial matters (including preparation of this Affidavit). Ms. Jimenez continued to perform legal research, primarily for jury instructions, Ms. Pelton attended trial as a paralegal to operate the projector and coordinate exhibits, and Mr. Maughan and Ms. Bailey performed services as paralegals during trial. Total costs are $812.31, including a charge for on-line Lexis research in the amount of $588.13. A detailed accounting of the Lexis research performed is provided.

o. Exhibit O is an invoice from Litigation Technology, Inc., for rental of the projector and computer at trial, in the amount of $1,435.73. I believe that use of the projector was essential to enable the jury to follow and understand the documents establishing that Mr. Eggett's termination was wrongful, that Mr. Eggett was entitled to book value for his shares, and to establishing book value itself.

p. Exhibit P are invoices for court reporter fees paid directly by Mr. Eggett. One invoice is for $498.80. The other is for $229.00.

17. I believe these fees were reasonably incurred. On behalf of Mr. Eggett, I took only two depositions–Keith Painter and Tod Cusick. Wasatch took all other depositions. To save expense, I did not depose Dennis Fox, Brian Watts, Greg Probst, or Ward Coombs, all of whom were identified as trial witnesses, and all of whom testified at trial. I also delayed performing any legal research until it was absolutely clear that the matter would go to trial. I also was required to file two motions to compel because Wasatch initially refused to produce documents that I considered relevant, which increased the fees incurred.

18. Utah Rule of Professional Conduct 1.5(4) and Hensley hold that the trial court should consider the result obtained in determining the reasonableness of the fee, and that an enhanced fee may be appropriate. Given the jury verdict for Eggett and against Wasatch on all claims, I believe

that an enhanced fee would be appropriate. Mr. Eggett does not seek an enhancement of fees. Instead, I cite this factor simply to underscore the reasonableness of the fees that Mr. Eggett has incurred and is entitled to recover.

19. Some of the costs identified in the Affidavit are taxable costs that may be awarded pursuant to Utah R. Civ. P. 54(d). Mr. Eggett does not seek a double recovery of these costs; if the Court awards to Mr. Eggett all of his costs, Mr. Eggett will file a Memorandum of Costs pursuant to Rule 54(d) to preserve an independent basis for the award of these costs in the event there is an appeal.

Dated this 6 of December, 1999.

Perrin R. Love, Esq.

On the 6 day of December, 1999, Perrin R. Love, being first duly sworn under oath, stated that he has read the foregoing Affidavit and knows the contents thereof and the same are true to the best of his knowledge, except as to those matters stated to be alleged on information and belief, and to those matters he believes them to be true.

NOTARY PUBLIC
K. NICOLE HOLT
201 South Main #1300
Salt Lake City, UT 84111
My Commission Expires
June 21, 2003
STATE OF UTAH

Notary Public

Perrin R. Love (5505)
CLYDE SNOW SESSIONS & SWENSON
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111
(801)322-2516

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY STATE OF UTAH

ROGER K. EGGETT, JR., an individual, Plaintiff, vs. WASATCH ENERGY CORPORATION, a Utah Corporation, Defendants.	REPLY AFFIDAVIT OF PERRIN R. LOVE IN SUPPORT OF AWARD OF COSTS AND ATTORNEY'S FEES Civil No. 97-0906444CV Judge David S. Young

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Perrin R. Love, being first duly sworn, on his oath deposes and verily states:

1. I have been a shareholder of Clyde, Snow, Sessions & Swenson since September 1998 ("Clyde, Snow"). Before that, I was a shareholder at Campbell, Maack & Sessions ("CMS"). I have served as counsel for Roger Eggett ("Mr. Eggett") in the above-captioned litigation.

2. I submit this Reply Affidavit in Support of Award of Costs and Attorney's Fees to respond to the Memorandum in Opposition to Plaintiffs Motion for Award of Attorneys Fees ("Mem. Opp.") submitted by defendant Wasatch Energy Corp. ("Wasatch"). All statements are based upon my personal knowledge and my review of the billing records of Clyde, Snow and CMS.

ATTORNEY'S FEES

3. Contrary to Wasatch's assertion, Mem. Opp. at 2-3, my initial Affidavit properly segregates fees incurred on Eggett's claims brought pursuant to the Shareholder Agreement (which has an attorney's fee provision) from his claims brought pursuant to the Employment Agreement (which has no attorney's fees provision). Eggett seeks no fees or costs incurred before May 16, 1997, when Wasatch purported to terminate him for cause and to deny him book value for his shares.

4. From that point forward, there is no principled way to distinguish time or expenses incurred on Eggett's claims under the Shareholder Agreement from his claims under the Employment Agreement, or from Wasatch's counterclaims. Every fact relating to Wasatch's counterclaims for excessive compensation and abuse of Eggett's expense account would have been litigated whether or not Wasatch filed a counterclaim, because Wasatch asserted those facts as a defense to Eggett's claims for book value for his shares. (Wasatch asserted that Eggett was not entitled to book value because he took excessive compensation and abused his expense account, justifying his termination for cause.) All of the fees and costs were "necessarily incurred" to prosecute Eggett's claims under the Shareholder Agreement, and Eggett is entitled to recover them.

5. The same is true of Eggett's claim under the Employment Agreement for additional compensation between January and May 1997. Because Wasatch claimed that Eggett took excessive compensation during this period (and purported to terminate him for it), all of the facts surrounding Eggett's 1997 compensation would have been litigated whether or not Eggett pursued a claim under the Employment Agreement for additional compensation.

6. My initial Affidavit complies with the requirements of Foote v. Clark, 962 F.2d 52 (Utah 1998), and Valcarce v. Fitzgerald, 961 P.2d 305 (Utah 1998), relied upon by Wasatch, because the Affidavit segregates those fees and expenses incurred in pursuing claims under the Employment Agreement. Neither Foote nor Valcarce stand for the proposition that a prevailing party cannot recover fees and expenses necessarily incurred on claims that entitle the party to fees and costs, simply because those fees and costs also relate to other claims.

7. Neither Foote nor Valcarce is factually similar to the situation here. In Valcarce, the litigation involved several phases and several parties. The defendant claimed that the prevailing party failed to allocate those fees that were incurred against other parties, or to distinguish those fees that were incurred before the defendant was joined in the lawsuit. See 961 P.2d at 317. In Foote v. Clark, 962 F.2d 52 (Utah 1998), a disappointed home buyer sued the seller for breach of the real estate purchase contract (which had an attorney's fee provision), and sued the seller's broker for tortuous interference of contract. In requesting attorney's fees, the buyer did not distinguish time and expense pursing the breach of contract claims against the seller, and time and expense pursing tort claims against the broker. See 962 P.2d at 56-7.

COSTS

8. Wasatch objects to many of the costs incurred by Eggett, because they are not taxable costs within the scope of Utah R. Civ. P. 54(d). See Mem. Opp. at 6-7. The objection is unfounded, because Eggett's right to recover these costs is contractual, not statutory. Paragraph 19(c) of the Shareholder Agreement states that "the prevailing party shall be entitled to recover its costs of suit, including reasonable attorneys' fees." By its plain language, paragraph 19(c) defines costs to include all costs, not just taxable costs, because it defines costs to include attorneys' fees. Those costs that

are not properly recoverable as taxable costs pursuant to Rule 54(d) are recoverable pursuant to the Shareholder Agreement.[1]

9. To respond to Wasatch's objections to specific costs:

a. Runner Fees. Runner fees were incurred in the ordinary course of business, as appropriate, generally to provide hand delivery of pleadings, important documents, or sizable documents to court and to opposing counsel. When mailing or faxing was appropriate, those methods were preferred, particularly of correspondence between counsel.

b. Photocopies. Photocopies were made, in the ordinary course of business, of correspondence, pleadings, documents, and exhibits, to provide to the client or opposing counsel, to maintain records for our files, and for use in discovery and at trial. The vast majority of photocopies are for trial exhibits in October and November 1999. The price is $.18 per page, and is recorded and allocated to Roger Eggett at the time the copy is made.

c. Mediation Expenses. Although the Mediation was required by paragraph 9(i) of the Employment Agreement, the parties agreed to mediate all claims and to attempt to resolve all claims, including Eggett's claims pursuant to the Shareholder Agreement. Indeed, I prepared and submitted to the mediator a Statement of Position that primarily addressed Eggett's right to book value for his shares, and the facts and circumstances establishing that Wasatch terminated Eggett in bad faith to deny him book value for his shares. The mediation primarily focused on these issues, as well as Wasatch's defense that Eggett was properly terminated for cause because Eggett took excessive compensation and abused his expense account. Again, these issues are inextricably intertwined because one is a defense to the other.

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[1]Under Rule 54(d), costs are recoverable "only in the amounts and in the manner provided by statute, and generally is restricted to those costs which are "required to be paid to the court and to witnesses . . . ." Frampton v. Wilson, 605 P.2d 771, 773-74 (Utah 1980). No such restriction applies to a contractual provision. Pursuant to Rule 54(d), Eggett is submitting a separate Verified Memorandum of Costs to establish an independent basis for an award of those costs.

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d. Long distance telephone calls. All long distance telephone calls were to Roger Eggett at the Bear River Lodge, where he was employed, or to his home in Evanston, Wyoming, where he moved to run the Bear River Lodge. They were necessary to prosecute Mr. Eggett's claims.

e. Deposition Costs. Wasatch complains that my Affidavit fails to specify deposition costs, other than the costs associated with the Keith Painter, Curtis Chisholm, and David Lillywhite depositions. To the contrary, paragraph 16.1. of the Affidavit and Exhibit L each specify $438 as the court reporter fees for the Tod Cusick deposition. Wasatch cannot deny that the Cusick deposition was used at trial. Wasatch argues that Eggett is not entitled to reimbursement for transcripts of the Chisholm and Lillywhite depositions, because Wasatch took those depositions. Wasatch cites no authority for the assertion and it makes no sense. No Utah authority excludes deposition transcripts as a taxable cost, and Form 23 to the Utah Rules of Civil Procedure specifially includes as a taxable cost "deposition transcript." Regardless whether a deposition transcript is a taxable cost, it is a recoverable costs pursuant to paragraph 19(c) of the Shareholder Agreement. Chisholm and Lillywhite were non-party witnesses; their testimony was necessary to develop Eggett's case. Eggett would have deposed them if Wasatch had not; and I questioned each witness on behalf of Eggett.

f. Witness Fees. The witness fees are as follows:

May 29, 1998	Service of Subpoena Duces Tecum To Ernst & Young	$ 5.00
October 14, 1998	Service of Subpoena Duces Tecum on Magna Energy	$ 38.00
October 28, 1999	Trial subpoenas for Keith Painter and Curtis Chisholm	$ 37.00
November 5, 1999	Service of Trial Subpoenas on Keith Painter and Curtis Chisholm	$ 85.00

g. Lexis Legal Research. This research was conducted by Mickell Jiminez, and is identified in the billing statements for October and November 1999, Exhibits M and N to my initial Affidavit. All of this research related to Eggett's claims under the Shareholder Agreement. To summarize those entries, Ms. Jiminez researched wrongful termination issues, both to prepare jury instructions and to anticipate issues and evidence that might be raised at trial. These included the admissibility of after-acquired evidence as a justification for termination for cause; the right of an employer to terminate an employee for cause after the employee has resigned; the right of members of a board of directors to rely on reports from employees or other board members; the elements and requirements of "bad faith" by members of the board of directors in performing their duties, including terminating an officer or employee for cause, and the burden of proof on these issues. Ms. Jiminez was required to use Lexis to research case law outside the states encompassed by the Pacific Reporter. Moreover, in my opinion, use of electronic research is more efficient and less expensive than requiring a lawyer to review regional treatises and other sources of case law.

h. Use of Projector at Trial. As explained in my initial Affidavit, the projector was necessary to present the documentary exhibits to the jury in an efficient and comprehensible manner

10. To eliminate ongoing dispute about these matters, however, I have reviewed the billing records in light of Wasatch's objections, and make the following redactions to the fees and costs identified in the initial Affidavit:

a. August 28, 1997, "Meet with Roger Eggett to discuss revised fee agreement; prepare revised fee agreement," 1.5 hours, $225.00;

b. October 28, 1997, "Draft Reply to Counterclaim," 1.0 hour, $150.00;

c. November 25, 1997, telephone conference with Eric Olson regarding request for cooperation in United litigation; telephone conference with Roger Eggett regarding same," 0.5 hours, $75.00;

)U

d. September 4, 1997, runner services to file Complaint in Second District Court and to serve on Wasatch, $52.00 (again, because the Complaint was later filed in Third Diistrict Court, Wasatch should not bear this expense).

e. October 9, 1998, Magna Energy Witness Fee $ 17.00, duplicate billing.

11. I have made no similar redaction for discussion with Mr. Eggett regarding his non-competition agreement, see Mem. Opp. at 5, because that discussion arose in the context of negotiations to settle all claims. I have made no redaction regarding my review of correspondence from David Lillywhite, Mem. Opp. at 5, because I reviewed that correspondence in the course of determining whether Wasatch's purported termination of Eggett for cause was a pretext to deny him book value for his shares. Finally, I have made no redaction for research relating to jury instruction, or for responding to discovery requests, Mem. Opp. at 5, because those activies squarely related to Eggett's claims for book value for his shares.

12. The redactions identified in paragraph 10 total $519.00. This reduces Eggett's requested costs and fees to $56,381.27.

Dated this 23 of December, 1999.

Perrin R. Love, Esq.

On the 23 day of December, 1999, Perrin R. Love, being first duly sworn under oath, stated that he has read the foregoing Affidavit and knows the contents thereof and the same are true to the best of his knowledge, except as to those matters stated to be alleged on information and belief, and to those matters he believes them to be true.

NOTARY PUBLIC
[illegible] HOLT
20[illegible] South Main #1300
Salt Lake City, UT 84111
My Commission Expires
June 21, 2003
STATE OF UTAH

Notary Public

IN THE SUPREME COURT OF THE STATE OF UTAH

—oooOoo—

In re: Judicial Conduct Commission Inquiry Concerning a Judge; Hon. David S. Young F00-3D-037 and 051

Case No. 20000521-SC

ORDER

Pursuant to the authority vested in the Supreme Court by Article VIII, Section 13 of the Utah Constitution and section 78-8-107(7) of the Utah Code, the Court approves the implementation of the Judicial Conduct Commission's order of public reprimand.

Nov. 7, 2000
Date

Richard C. Howe
Chief Justice

BEFORE THE JUDICIAL CONDUCT COMMISSION

In re:	:	FINDINGS OF FACT, CONCLUSIONS
	:	OF LAW, AND ORDER
Inquiry Concerning	:	
a Judge	:	F00-3D-037
	:	F00-3D-051

2000521

A quorum of the Judicial Conduct Commission, having considered the record in this case, enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On November 17, 1999, at the conclusion of the *State v. Shawn L. Martin* criminal trial, Judge David S. Young criticized the jurors by making the following on-the-record comments in the courtroom:

> COURT: I want to tell you [the jurors] that I am personally disappointed in your verdict in this case and that's all I'm going to say about it. I think that this was a pretty clear case. I don't know how you came out with this result and this is one of the very few times I have criticized a jury for their verdict. Thank you. You may be excused. Anything else?
>
> COUNSEL: No, Your honor.

2. After the *Martin* trial, the jurors were escorted to the jury room, where Judge Young spoke with the jury and expressed his disagreement with their verdict.

3. On December 1, 1993, at the conclusion of the *State v. Travis A. Johnson* criminal trial, Judge Young criticized the jurors by making the following on-the-record comments in the courtroom:

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> I will tell you from my perspective that the jury and the jurors in normal circumstances err on the side of compassion. This is a case in which they did that. I do not believe the testimony of Mr. Johnson. From my perspective I don't know how the jury does, but I believe that the circumstances, Mr. Johnson, you were not candid in this case and I think you were very fortunate to have a not guilty verdict.
>
> That being the verdict of the jury the court will accept it as the decision of the court and the case is dismissed. And you are released from any further obligation on these cases.
>
> And I will suggest to you, Mr. Case, that I believed your story and that I believe that the jury was out of line. And that's the end of the case.

4. Canon 3B(10) of the Code of Judicial Conduct prohibits judges from commending or criticizing jurors for their verdict other than in a court order or opinion in a proceeding.

5. By the way in which he treated the jurors in the *Martin* and *Johnson* cases, as described above, Judge Young violated Canon 3B(10) of the Code of Judicial Conduct.

CONCLUSIONS OF LAW

Judge Young engaged in conduct prejudicial to the administration of justice which brought a judicial office into disrepute, in violation Section 78-7-28(1)(e) of the Utah Code, because he prejudiced public esteem for the judicial office and violated Canon 3B(10) of the Code of Judicial Conduct, which prohibits judges from commending or criticizing jurors for their verdict other than in a court order or opinion in a proceeding.

ORDER

Judge Young is publicly reprimanded for engaging in conduct prejudicial to the administration of justice which brought a judicial office into disrepute, in violation of Section 78-7-28(1)(e) of the Utah Code, because he prejudiced public esteem for the judicial office and violated Canon 3B(10) of the Code of Judicial Conduct, which prohibits judges from commending or criticizing jurors for their verdict other than in a court order or opinion in a proceeding.

DATED this 13 day of June, 2000

THE JUDICIAL CONDUCT COMMISSION

David Nuffer, Chair

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June, 2000, I served a copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** on the Hon. David S. Young by mailing a copy thereof, postage prepaid, to:

Hon. David S. Young
Third District Court
450 South State
Salt Lake City, Utah 84111-3101

Steven H. Stewart

April 15, 1997

Board of Directors
Wasatch Energy Corporation
240 South 200 West
P.O. Box 699
Farmington, UT 84025

Please accept this notice of my resignation as President and Chairman of the Board of Directors of Wasatch Energy Corporation and Wasatch Oil & Gas Corporation (collectively, the "Company").

In accordance with the Employment Agreement (the "Agreement") entered into between the Company and myself dated March 31, 1995, I make the following assertions:

1. My employment terminates 90 days after the date of this resignation which is July 14, 1997. July 14, 1997 will be my date of termination.
2. I am under no obligation to continue to guarantee the line of credit and will immediately notify Barnes Banking Co. of my resignation and of my withdrawal of the personal guarantee.
3. I am under no obligation to continue as a Director or as Chairman of the Board of Directors and therefore immediately resign from these positions.
4. I am restricted from performing certain activities as outlined in paragraph 6 of the Agreement for a period of 12 months following the termination of my employment.

In accordance with the Shareholders' Agreement entered into between myself and Todd D. Cusick and Curtis R. Chisholm on or about the first week of April 1995, I am required to sell my shares in the corporation on a pro rata basis to Todd D. Cusick and Curtis R. Chisholm for the audited Book Value as of June 30, 1997. In the event these two individuals do not purchase the stock the Corporation has the right to purchase any remaining shares for the same price.

Please inform me of the activities I should perform prior to July 14, 1997.

Sincerely,

Roger K. Eggett, Jr.